No. ____

In The

Supreme Court of United States

LEONYER RICHARDSON

Petitioner,

v.

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, ET. AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

JOSEPHINE S. MILLER
Suite 13
130 Deer Hill Avenue
Danbury, CT 06810
(203) 730-9184
*Counsel of Record

QUESTION PRESENTED

Whether it is a violation of Title VII of the Civil Rights Act of 1964 for an employer and union to negotiate a clause that requires employee election of remedies as between the grievance/arbitration provision of their contract and rights secured by Title VII or state anti-discrimination laws?

PARTIES TO THE PROCEEDING

Petitioner is Leonyer Richardson. She is plaintiff in the District Court and appellant in the Court of Appeals. She brings this action on her own behalf.

Respondents are State of Connecticut, Office of Policy and Management, Commission on Human Rights & Opportunities, and its Executive Director Cynthia Watts-Elder, Leanne Appleton, Donald Bardot, Linda Yelmini, Administrative and Residual Employees Union. They were defendants in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES:

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. A) is reported at 532 F.3d_114 (2nd Cir. 2008). The decision of the District Court (App. C) is found at (D. Conn. 2005).

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 states:

a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

because of such individual's race, color, religion, sex, or national origin; or

c) Labor organization practices

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case presents questions about whether an employer and a labor union may negotiate an election of remedies clause in a collective bargaining agreement that requires a cessation of any grievance arbitration proceedings if the employee files a claim of discrimination under Title VII of the Civil Rights Act of 1964 as amended or a similar state anti-discrimination statute. The

Seventh Circuit Court of Appeals has resolved this issue by concluding that a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity (i.e. ADEA). Citing the decision of this Court in *Alexander v. Gardner-Denver,* the Seventh Circuit further discussed the well-established principle that neither the employer or a union can be permitted to waive a employee's statutory rights.

By contrast, the Second has split on this issue of profound national importance, holding that a union and an employer are not precluded from agreeing that employees must forego their right to arbitrate a grievance if they bring an administrative or judicial action arising out of the same facts. Other Circuits, notably the First and Sixth, have held that a clear and unmistakable waiver foreclosing employee entitlement to a judicial forum may be negotiated.

I. FACTUAL BACKGROUND

A. Plaintiff

Plaintiff, Leonyer M. Richardson, was employed as a fiscal administrative officer by the Connecticut Commission on Human Rights & Opportunities (the state anti-discrimination deferral agency). She was a member of a bargaining unit represented at all material times by Administrative and Residual Employees Union (hereafter "A&R"). Richardson was terminated from state employment at a time when she had a pending charge of race discrimination against her employer and a pending grievance. Upon learning that Richardson had filed an administrative charge of discrimination, her union

withdrew her contract grievance at the Third Step, in reliance upon a contract clause that prohibited an employee from continuing in the grievance/arbitration forum whenever an administrative or judicial charge is filed.

B. The Employer and Union Negotiated Policy and Practice

The State of Connecticut, Office of Policy and Management (hereafter "OPM") has been party to a collective bargaining agreement with A&R Union containing a contract clause that reads in pertinent part:

> "[n]otwithstanding any other provision of this Agreement, the following matters shall be subject to the grievance procedure but not to arbitration: ... (2) disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.

Both OPM, the Union and the Employer (CHRO) have consistently argued that their negotiation, execution and maintenance of this clause in the collective bargaining agreement is not prohibited.

II. PROCEEDINGS BELOW

A. The District Court

On April 9, 2002 Richardson filed an employment discrimination complaint against C.H.R.O., several of its employees, the State Office of Policy and Management, and her Union. On March 31, 2005 the District Court granted a

Motion for Summary Judgment in favor of all defendants. The district court concluded that the contract clause was protected by the Federal Arbitration Act. The District Court further determined that there was no discrimination or retaliation against Richardson by any of the defendants.

B. The Court of Appeals

On appeal to the Second Circuit Court Richardson argued that the contract clause requiring an election of remedies or forum selection was not saved by the Federal Arbitration Act and in fact was both discriminatory and retaliatory. Richardson also argued that the District Court had made reversible errors of law in finding that the underlying termination of her employment violated Title VII. In a panel decision the court concluded that the union did not discriminate against Richardson by adhering to the election-of-remedies provision after she chose to file a charge with the CHRO. Further the Court found that the contract clause did not constitute a waiver of any statutory rights under *Gardner-Denver*, and that the defendants' withdrawal from arbitration was not retaliatory because the forum-selection clause was a reasonable defensive measure to avoid duplicative proceedings.

Richardson timely filed a request for hearing en banc. On October 30, 2008 the request was denied.

II. The *Gardner-Denver* Case.

While noting the tension between the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory (including retaliatory) employment

practices, this Court resolved that tension a generation ago by holding that the doctrine of election of remedies has no applicability in the context of enforcement of employee statutory rights. In *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974) this Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance/arbitration clause of a collective bargaining agreement and his cause of action under Title VII." The distinct nature of contract rights under a collective bargaining agreement and those under anti-discrimination statutes, even resulting from the same factual occurrence, requires the freedom of employees to simultaneously pursue claims in both fora.

The tension between the two policies was again noted and resolved in favor of dual remedies in the context of other statutory rights such as minimum wage provisions under the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S. 728 (1981).

Lower courts have begun to obscure the right of union represented employees to be free from retaliation for attempting to enforce their statutory rights. This has occurred in part because of this court's line of cases regarding arbitration clauses that allow the mandatory waiver of statutory rights and dicta that suggests that a union may waive employees' rights to a federal judicial forum for statutory antidiscrimination claims when the agreement to arbitrate such claims is "clear and unmistakable". Compare *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). This Court has specifically declined to reach the question whether a

collective bargaining agreement may encompass the waiver of employment discrimination claims.

REASONS FOR GRANTING THE WRIT

The congressional objective of Title VII is that all employees have a statutory right to be free from discrimination and retaliation. The anti-retaliation provision of Title VII are an important means of assisting the EEOC in its enforcement work and is largely dependent upon individual employee cooperation. There is no sound basis for differentiating between the enforcement of statutory rights of those employees who are represented by a labor union. There is now a sharp disagreement among the circuit courts about whether an employer and labor union may be permitted to abridge statutory rights by retaliating against an employee who chooses to utilize grievance/arbitration fora in addition to or simultaneously with judicial or administrative fora.

The Seventh Circuit has held that a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity and that such clauses are retaliatory *per se*. Conversely, the Second Circuit has held that a union and an employer are not precluded from agreeing to a contract clause that requires employees to forego their right to arbitrate a grievance if they bring a lawsuit in federal court arising out of the same facts. *EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992), Cert denied 506 U.S. 906 (1992).

Conversely, in *Richardson*, the Second Circuit has found the same type of contract clause to be lawful and non-

retaliatory. While only the Seventh and Second Circuits have dealt directly with the precise issue of whether such contract clauses violate the anti-discrimination laws, other Circuits have appeared to gingerly deal with the legality of contract clauses that appear to require a waiver of employee statutory rights. These decisions have arisen in varying contexts such as mandatory arbitration agreements, and motions to compel arbitration.

The Fourth Circuit has held that a union-negotiated collective bargaining agreement may waive an employee's statutory right to litigate his employment discrimination claims in a judicial forum, thus implicitly finding no retaliation. *Eastern Associated Coal Corp. v. Massey,* 373 F.3d 530 (4th Cir. 2004).

In *Wedding v. University of Toledo*, 89 F.3d 316 (6th Cir. 1996), the District Court had found unlawful a contract clause that stated "[i]f a grievant seeks relief through a judicial or administrative forum outside of this grievance procedure for a subject matter covered by a grievance, the processing of the grievance shall be held in abeyance until the outside forum has issued a final determination or unless both the Employer and [the union] agree otherwise." On appeal to the Sixth Circuit, it was held that the District Court had reached this conclusion prematurely and that because the parties had contracted to have disputes settled by an arbitrator rather than a judge, those procedures must first be exhausted, citing the Steelworkers' Trilogy. Thus, the Circuit failed to reach the ultimate issue of whether the clause was unlawful.

While also noting the tension between federal labor policy and federal anti-discrimination policy, other lower courts have side-stepped the matter of whether collective

bargaining agreements may directly waive or cause an election of remedies by employees. *See, e.g.*, *O'Brien v. Town of Agawam*, 350 F.3d 279, 285 (1st Cir. 2003) ("The *Wright* Court declined to resolve this tension [between enforceability of mandatory arbitration clauses in individual contracts and those in CBAs], holding that even assuming a CBA can waive an employee's right to a federal forum, any such waiver must at a minimum be "clear and unmistakable."); *Mitchell v. Chapman*, 343 F.3d 811, 824 (6th Cir. 2003) ("Assuming *arguendo*, that the CBA mandates binding arbitration, it is well-established that the CBA must contain a 'clear and unmistakable waiver' of [Family and Medical Leave Act] rights to foreclose entitlement to a judicial forum."); *Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 317 (7th Cir. 2002) (citing *Gardner-Denver*, but noting the ambiguity in the CBA language); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 522 (7th Cir. 2001) (holding that "a union cannot surrender employees' rights under Title VII").

The issue as seen by the Second Circuit in *Richardson* was "... whether Title VII of the Civil Rights Act of 1964 forbids the inclusion of an election-of-remedies provision in a collective bargaining agreement, or, in the alternative, whether adherence to that provision constitutes discrimination".

The *Richardson* court distinguished between (a) the law governing contracts that purport to release or waive Title VII rights and (b) the law governing employer actions taken in retaliation for employee opposition to unlawful employment practices, including the filing of charges with the EEOC or its state analogues.

Richardson creates an affirmative defense to what would otherwise be retaliatory action by concluding that the contract clause was a reasonable defensive measure by the employer to avoid duplicative proceedings in two fora. Further, the union was accorded an affirmative defense based upon the court's view that "...it also makes sense that a union might want to deploy its scarce resources selectively." *Gardner-Denver* recognized this very type of situation in whi h "the interest of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Gardner-Denver,* 415 U.S. at 58, n. 19).

As noted by the Seventh Circuit in *U.S.E. E. O. C. v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982) "[r]ights conferred by Congress on a class of individuals vulnerable to discrimination are endangered if they may be waived by a majority vote, and because the principle of majority rule is central to the collective bargaining process, the possibility always exists — by design — that the majority will subordinate the interests of the minority".

Leaving protected class employees in unionized workforces subject to collectively bargained agreements that require to choose between contract rights and statutory rights would leave implementation of Title VII "...sporadic and unpredictable, depending almost entirely on the economic bargaining strength of the union, the incentives offered in exchange for these statutorily conferred rights, and the intensity of management attitudes toward the Act." *U.S.E. E. O. C. v. County of Calumet, Id.* Thus the affirmative defense found acceptable by the *Richardson* court would permit a union to barter the individual rights of a few members in order to reduce the financial obligations of many others.

The kind of contract clause found by the *Richardson* court to be acceptable violates Title VII because it discriminates against protected class employees. This is so because only those employees who are protected by state and federal anti-discrimination statutes are deprived of the contract right to the grievance/arbitration procedures. Non-protected class employees could fully utilize the grievance/arbitration process and still retain their right, for example, to file a whistleblower claim under Sarbanes-Oxley.

The type of clause at issue in *Richardson* is also facially retaliatory. This was the finding of the Seventh Circuit in *Board of Governors*. As noted by that court, such contract clauses deprive claimants of a term or condition of employment available to others and deter them from exercising their rights under the anti-discrimination laws. *Board of Governors* and *Richardson*, on almost identical facts, stand in sharp contrast regarding whether an employee suffers an adverse employment action when they are required to forego one of the remedies for discrimination that is available to them. See also *Fasold v. Justice*, 409 F.3d 178 (3rd Cir. 2005) (Finding that Fasold was subject to an adverse employment decision when his Level II grievance was denied).

The anti-retaliation provisions examined in *Board of Governors* and *Richardson* are analogous. Section 4(d) of the ADEA, the provision at issue in *Board of Governors*, parallels Section 704(a), Title VII and provides:

> It shall be unlawful for an employer to discriminate against any of his employees because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner

in an investigation, proceeding, or litigation under this chapter. 29 U.S.C. § 623(d).

The purpose of the anti-retaliation provision of Title VII is to secure enforcement of the Act's basic guarantees by "maintaining unfettered access" to statutory remedial mechanisms". In *Burlington Northern* this Court agreed that unfettered access to the statutory remedial mechanisms would be best served by a broad scope of the anti-retaliation provision permitting employees to challenge any employer (or labor union) action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination". *Burlington Northern Santa Fe Railway v. White,* 548 U.S. 53 (2006).

Where a union represented employee chooses to assert Title VII rights, it cost that employee something; the right to proceed in the contractually guaranteed binding arbitration that controls the outcome of an ultimate employment decision. Under *Burlington Northern*, a reasonable employee/union member would be deterred from exercising their rights under Title VII in the face of such a required election of remedies.

In *Richardson*, notably it was also admitted that Defendant Office of Labor Relations had a 15 year history that "where it was known that the grievant had made a claim of discrimination and at the same time filed a complaint with CHRO, the grievance was *denied*." A causal connection between the challenged contract clause and the protected activity was irrefutably established. Under well-established principles, a showing that the adverse action directly followed the filing of an administrative charge is sufficient to establish the requisite causal connection. This denial of a grievance is clearly an

adverse employment action based solely upon the protected activity of filing a discrimination complaint without regard to the merits of the grievance. This is particularly true since the contract clause at issue prohibited arbitration but permitted use of the grievance procedure. By prohibiting arbitration of grievances that involve statutory rights, the Defendant-Union, OPM and CHRO impermissibly forced employees to forego a contract right (arbitration) should they choose to exercise their statutory rights.

The Second Circuit, and those circuits that have been reluctant to find such clauses unlawful because of the *Gilmer / Circuit City / Wright* line of cases, has created the anomaly that protected class unionized workers suffer an adverse employment action, a change for the worse in the terms and conditions of their employment solely and directly because of their decision to engage in the protected activity of exercising their statutory rights.

The Second Circuit appeared troubled that the anti-retaliation provision protects employees from particular acts of discrimination that are retaliatory and that discrimination claims require courts to consider details such variables as the intent of the employer. However, the absence of malevolent intent has not been found by this Court to provide a justification for discrimination or retaliation. *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). An employer's reasons for adopting the challenged policy are irrelevant to the policy's legality. Nothing in Section 4(d) of ADEA or Section 704(a) requires a showing of intent in retaliatory policy cases contrary to the concern of *Richardson*. Moreover, not even "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S.

69, 75 (1984). Once a contract right to a grievance-arbitration procedure has been given to employees, the withholding of that right constitutes an adverse employment action.

THIS CASE PRESENTS ISSUES OF FUNDAMENTAL NATIONAL IMPORTANCE

This case presents the question whether employees in unionized workplaces may be discriminated against or retaliated against by way of a collective bargaining agreement that requires them to select between the grievance/arbitration procedure or an administrative/judicial procedure with respect to discrimination claims.

More than forty years ago Congress enacted Title VII of the Civil Rights Act of 1964 to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). The paramount importance of these statutory rights for unionized employees has been recognized by this Court since *Gardner-Denver*. Employees who have chosen to be represented by a labor union must not be penalized by a judicial ruling, such as *Richardson*, that permits their employer and union to bargain away statutory rights that single them out for adverse employment action.

The federal policy favoring arbitration of labor disputes is concerned with the majoritarian process and must be limited to workplace matters that are truly collective in nature. The long history of union

discrimination against minorities and women prompted Congress to include unions within the reach of the statutory prohibitions against discrimination. As noted by the dissent in *Barrentine,* this long history of discrimination by labor unions, "...it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens". *Barrentine,* Id.

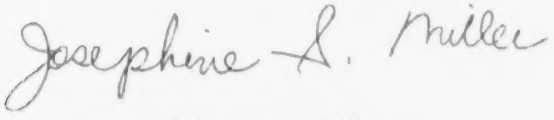
Collective bargaining clauses that require an employee election of remedies regarding discrimination claims are retaliatory *per se* because they embody a policy that wrests away from unionized employees who happen to be within a protected category (i.e. race, color, religion, sex, or national origin) something that is available to their co-workers who happen to not be within those protected categories (i.e. the contractual right to utilize the grievance/arbitration procedure). Such contract clauses would deter employees from engaging in the exercise of their statutorily conferred rights and would render less effective, the important work of EEOC in enforcement of anti-discrimination laws. While the arbitral forum works well for defining and applying the law of the shop, it is an inferior means of enforcing the Title VII and other anti-discrimination laws. *Gardner-Denver*, Id.

The issue is ripe for decision by this Court to resolve once and for all time the tension between *Gardner-Denver* and more recent precedent such as *Wright v. Universal Maritime.*

CONCLUSION

Because this case presents an important issue of federal law upon which the circuits are divided, and which should be settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Josephine S. Miller
Counsel of Record
130 Deer Hill Avenue,
Unit #13
Danbury, Connecticut 06180
Telephone (203) 730-9184
Facsimile (203) 798-6449

Counsel for Petitioner,
Leonyer Richardson

In The

Supreme Court of United States

LEONYER RICHARDSON

Petitioner,

v.

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES,

ET. AL.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

APPENDIX

JOSEPHINE S. MILLER
Suite 13
130 Deer Hill Avenue
Danbury, CT 06810
(203) 730-9184

*Counsel of Record

Appendix A

06-0474-cv
Richardson v. Comm'n on Human Rights & Opportunities

UNITED STATES COURT OF APPEALS
FOR THE SECOND
CIRCUIT

August Term 2006

(Argued: February 9, 2007 Decided: July 7, 2008)
Docket No. 06-0474-cv

LEONYER M. RICHARDSON,
Plaintiff-Appellant,
-- v. --

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF POLICY AND MANAGEMENT, CYNTHIA WATTS ELDER, LEANNE APPLETON, LINDA YELMINI, DONALD BARDOT and ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION,
Defendants-Appellees.

B e f o r e : WALKER, SACK, and WESLEY, Circuit Judges.

Appeal by Plaintiff-Appellant Leonyer M. Richardson from an amended judgment of the United States District Court for the District of Connecticut (Alfred V. Covello, Judge) granting Defendants-Appellees' motions for summary judgment and dismissing Richardson's suit in its entirety.

AFFIRMED.

JOSEPHINE S. MILLER, Danbury, CT for Plaintiff-Appellant.

JOSEPH A. JORDANO, Assistant Attorney General of the State of Connecticut, (Richard Blumenthal, Attorney General, David M. Teed, Assistant Attorney General, on the brief), Hartford, CT, for Defendants-Appellees CHRO, OPM, Watts Elder, Appleton, Yelmini, and Bardot.

JAMES M. SCONZO, Jorden Burt LLP, Simsbury, CT, for Defendant-Appellee Residual Employees Union Local 4200.

JOHN M. WALKER, JR., Circuit Judge:

We are asked to decide whether Title VII of the Civil Rights Act of 1964 forbids the inclusion of an election-of-remedies provision in a collective bargaining agreement, cf. EEOC v. SunDance Rehab. Corp., 466 F.3d 490, 497 (6th Cir. 2006), or, in the alternative, whether adherence to that provision constitutes discrimination. The Equal Employment Opportunity Commission ("EEOC") says that it does. The Connecticut Commission on Human Rights and Opportunities ("CHRO"), not incidentally also a defendant in this action, assures us that the EEOC is wrong.

We conclude that the law governing contracts that purport to release or waive Title VII rights is independent of the law governing employer actions taken in retaliation for, and intended to deter, employee opposition to unlawful employment practices, including the filing of charges with the EEOC or its state analogues. In analyzing the former, we apply Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974), and its progeny. In analyzing the latter, we apply the anti-retaliation provision of Title VII, 42 U.S.C. §

2000e-3(a), and cases interpreting its scope, see, e.g., Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). While there are limits on what a union may agree to in collective bargaining, Plaintiff's union has not transgressed them by contracting to limit an employee's legal recourse under certain circumstances. The collective bargaining agreement about which Plaintiff complains simply stipulates that an aggrieved employee may either arbitrate her grievance *or* file a charge with the CHRO describing that grievance. Nor did the union discriminate against Plaintiff by adhering to the election-of-remedies provision after Plaintiff chose to file a charge with the CHRO. The union's choice to adhere to its collective bargaining agreement in this case was indubitably non-discriminatory: the collective bargaining agreement does not constitute a waiver of any statutory rights under Gardner-Denver, and the defendants' withdrawal from arbitration did not constitute retaliation because the forum-selection clause was a reasonable defensive measure to avoid duplicative proceedings in the two fora Richardson's employer maintained for addressing discrimination complaints. See

United States v. N.Y. City Transit Auth., 97 F.3d 672 (2d Cir. 1996). For these reasons, and because Plaintiff's remaining Title VII claims are groundless, we affirm the judgment of the district court.

BACKGROUND

Plaintiff-Appellant Leonyer M. Richardson, an African-American woman, was employed by the state of Connecticut for more than fifteen years. This appeal concerns the circumstances of her termination and subsequent efforts to arbitrate its legitimacy.

In 2000, Richardson transferred from the Connecticut Office of Policy and Management ("OPM") to the CHRO, joining the CHRO as a fiscal administrative officer. Shortly thereafter, she had a series of vituperative interactions with Leanne Appleton, her immediate supervisor at the CHRO, the most notable of which was a dispute concerning the proper method of making bank deposits.

Richardson complained that Appleton's demand that Richardson adhere to what Appleton claimed were proper procedures was "retaliation on Leanne Appleton's part."

After airing her grievances internally on several

occasions on July 30, 2001, Richardson filed a charge with the CHRO, which was not only Richardson's employer but also the state analogue to the EEOC. In her charge, Richardson alleged both disparate treatment and retaliation by Appleton. Between July 30 and October 16, 2001, the conflict between Richardson and Appleton escalated both in intensity and breadth: On October 3, 2001, Richardson amended her CHRO charge to further allege that a second CHRO employee, Cynthia Watts Elder, who supervised Appleton and Richardson, had retaliated against her for complaining about Appleton. Finally, on October 16, 2001, Watts Elder terminated Richardson's employment with the CHRO. Richardson thereupon sought the assistance of her union, Administrative and Residual Employees Union Local 4200 ("Local 4200"), in grieving her termination. In the interim, however, Richardson again amended her CHRO charge, adding an allegation that Watts Elder had only terminated her "for the purpose of [further] retaliating against [her]."

As the district court explained, "[u]pon discovering that Richardson had amended her . . . complaint against

CHRO to include an allegation of race discrimination regarding her termination, Richardson's union . . . withdrew its appeal of her grievance, as complaints of unlawful discrimination filed with CHRO are not subject to arbitration under the union contract." And, indeed, Article 15, Section 10 (a) (2), a provision of the collective bargaining agreement (CBA) that governs the relationship between Local 4200 and the CHRO and the one that is at the center of this dispute, stipulates that disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.[1]

Richardson filed yet another charge with the CHRO on April 9, 2002, alleging this time that Local 4200's refusal to seek arbitration of her grievance constituted an independent act of retaliation.[2]

---

[1] Plaintiff-Appellant has submitted two copies of this collective bargaining agreement. The second copy ostensibly provides that "disputes over claimed unlawful discrimination" are

[2] She also filed a similar charge on April 9, 2002 against OPM. OPM negotiated the collective bargaining agreement with Local 4200.

In a state like Connecticut that has an analogue to the EEOC, an aggrieved employee must first file with the state agency any charge she wishes to pursue in federal court. See 42 U.S.C. § 2000e-5(c). However, in many of these states, including Connecticut, any such charge is automatically cross-filed with the EEOC. Lewis v. Conn. Dep't of Corr., 355 F. Supp. 2d 607, 615 n.4 (D. Conn. 2005) (discussing Connecticut); App. 1037 (charge against Local 4200 shared by CHRO with EEOC); see, e.g., Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 307 (2d Cir. 1996) (discussing New York).

Thus, both the CHRO and the EEOC responded to Richardson's various charges. On March 15, 2002, the CHRO found that Richardson had not been "subjected to any adverse treatment on arbitrable until the "CHRO has held a formal hearing on the issue." While this difference is quite possibly material, as it is not clear on the record before us whether the union withdrew its appeal of Richardson's grievance before or after the CHRO held a formal hearing on her complaint, we credit the first copy of the collective bargaining agreement, as it is the only copy bearing a date stamp or a title page, and it is the copy upon

which the district court relied. the basis of [her] membership in a protected class." On September 4, 2002, the CHRO found that Local 4200 had not retaliated against Richardson. Finally, on April 1, 2003, the EEOC determined, to the contrary, that "Article 15, Section 10 of the collective bargaining agreement violate[d] Title VII."

After thus exhausting her administrative remedies Richardson filed this suit in federal district court against the CHRO, Appleton, Watts Elder, OPM, Linda Yelmini and Donald Bardot (both of whom were at all relevant times labor specialists in OPM), and Local 4200, claiming violations of Title VII, as well as 42 U.S.C. §§ 1981 and 1983, the Connecticut Fair Employment Practices Act, and the Connecticut Constitution. In a thorough opinion dated March 31, 2005, the United States District Court for the District of Connecticut (Alfred V. Covello, Judge) granted the motions for summary judgment of defendants CHRO, Appleton, Watts Elder, OPM, Yelmini and Bardot. The district court dismissed Richardson's Title VII disparate treatment claim against the CHRO because the CHRO had "sufficiently rebutted the inference of

discrimination raised by the plaintiff's prima facie case," and Richardson had not adduced evidence that the CHRO's reasons for disciplining her were merely pretextual. The district court dismissed her Title VII retaliation claim against the CHRO for similar reasons, finding that the CHRO had "a legitimate non-discriminatory reason for the alleged retaliation, 'namely insubordination, poor performance, and violence in the workplace.'"

The district court also dismissed Richardson's Title VII retaliation claim against OPM. The district court held that the collective bargaining agreement "does not violate the [Federal Arbitration Act], and it cannot give rise to an inference that OPM, by enforcing the terms of the [agreement], was motivated by a discriminatory animus."[3] The district court did not address Richardson's Title VII

---

3 Finally, the district court dismissed Richardson's various state law and constitutional claims against individual defendants Appleton, Watts Elder, Yelmini, and Bardot. Richardson does not meaningfully contest the district court's dismissal of her claims against Appleton and Watts Elder, and we therefore affirm the district court's judgment in that respect. See United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir. 1993). Moreover, Richardson's claims against Yelmini and Bardot were not adequately briefed below, and we decline to consider them here. See Gwozdzinsky v. Magten Asset Mgmt. Corp., 106 F.3d 469, 472(2d Cir. 1997).

retaliation claim against Local 4200.

On November 23, 2005, the district court granted Richardson's motion for a corrected judgment in order to address that claim. The district court noted that "[t]he Union proceeded according to [the collective bargaining agreement] . . . and the record is void of any evidence of discrimination."

It thereupon granted Local 4200's motion for summary judgment. On appeal, Richardson argues principally that the provision of the collective bargaining agreement invoked by Local 4200 to justify its refusal to seek arbitration of her grievance violates Title VII. She also briefly contests the district court's summary judgment in the CHRO's favor with respect to her disparate treatment and retaliation claims. It is, however, to her first, and more substantial, argument that we initially turn.

ANALYSIS

I. A Brief History of the Enforcement Mechanisms of Title VII

Title VII of the Civil Rights Act of 1964 ("Title VII" or "the Act"), 42 U.S.C. § 2000e et seq., forbids employment

discrimination on the basis of "race, color, religion, sex, or national origin," see 42 U.S.C. § 2000e-2(a) . The Act authorizes the EEOC "to prevent any person from engaging in any unlawful employment practice" forbidden by Title VII. See 42 U.S.C. § 2000e-5(a). It also permits an "alternative enforcement procedure," Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361 (1977): the filing of a lawsuit in federal court by an aggrieved employee, 42 U.S.C. § 2000e-5(f)(1). See generally Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 326 (1980).

As the Supreme Court has explained, "Title VII sets forth an integrated, multistep enforcement procedure [designed] . . . to detect and remedy instances of discrimination." EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984) (internal quotation marks omitted). The EEOC strives to conciliate employers and aggrieved employees, cf. Occidental Life, 432 U.S. at 368 (describing EEOC enforcement as "informal [and] noncoercive"), and acts primarily to vindicate the public interest, see Gen. Tel. Co., 446 U.S. at 326 (noting that in vesting the EEOC with its powers "Congress sought to implement the public interest").

While the EEOC may bring actions in federal court if it is unable to secure an acceptable conciliation agreement, see 42 U.S.C. § 2000e-5(f)(1), an aggrieved employee may also bring such a lawsuit himself, which "redresses his own injury [and] vindicates the important congressional policy against discriminatory employment practices," Gardner-Denver, 415 U.S. at 45.[4] Thus, Title VII contemplates two distinct enforcement mechanisms, but the trigger for each is the same: the filing of a charge with the EEOC by an aggrieved employee.[5] Indeed, in structuring Title VII, Congress counted "on employee initiative." Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 174-75 (2d Cir. 2005).

---

[4] See also EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1089 (5th Cir. 1987); cf. EEOC v. Waffle House, Inc., 534 U.S. 279, 296 (2002); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

[5] Compare EEOC v. Superior Temp. Servs., Inc., 56 F.3d 441, 444 (2d Cir. 1995) (noting that under 42 U.S.C. § 2005e-6(e) the EEOC may only investigate an employer on its motion in cases concerning "a pattern or practice of discrimination"), with Williams v. N.Y. City Hous. Auth., 458 F.3d 67, 69 (2d Cir. 2006) (per curiam) ("Before an individual may bring a Title VII suit in federal court, the claims forming the basis of such a suit must first be presented in a complaint to the EEOC or the equivalent state agency.").

Because a crafty employer might seek to dissuade aggrieved employees from filing charges with the EEOC — and thereby shortcircuit both enforcement mechanisms -- employees potentially aggrieved under Title VII are protected from interference in two principal (and perhaps distinct) ways.[6] First, in the "anti-retaliation provision," Congress explicitly forbade "discrimination" against an employee (1) who "has opposed any practice made an unlawful employment practice by [Title VII]" or (2) who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]," 42 U.S.C. § 2000e-3(a). See, e.g., Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 205-06 (2d Cir. 2006).

---

[6] Courts have also sought to protect potentially aggrieved employees in other ways. For instance, while an employee must usually file a charge with the EEOC before filing suit in federal court, we have waived this administrative exhaustion requirement with respect to retaliation claims. As we have explained, "[t]he more effective an employer was at using retaliatory means to scare an employee into not filing future EEO complaints, the less likely the employee would be able to hold the employer liable for that retaliation because the less likely the employee would risk filing an EEO complaint as to the retaliation." Terry v. Ashcroft, 336 F.3d 128, 151 (2d Cir. 2003).

Second, courts have inferred from the purpose and structure of Title VII a requirement — what we will call the "Gardner-Denver doctrine" -- that any release or waiver of Title VII meet certain requirements, including that "a collective bargaining agreement[, as opposed to an individually bargained employment contract] not waive covered workers' rights to a judicial forum for causes of action created by Congress." Pyett . Penn. Bldg. Co., 498 F.3d 88, 91 n.3 (2d Cir. 2007); cf. Rogers v. N.Y. Univ., 220 F.3d 73, 75 (2d Cir. 2000) (per curiam). Moreover, even with respect to individually bargained agreements, courts require that any such release or waiver be knowing and voluntary, see, e.g., Bormann v. AT&T Commc'ns, Inc., 875 F.2d 399, 402-03 (2d Cir. 1989), and some circuits have outright forbidden any release or waiver of the right to file a charge with the EEOC, see, e.g. , SunDance, 466 F.3d at 4989 (collecting cases). Both the anti-retaliation provision and the Gardner- Denver doctrine are meant to prevent discrimination; and contribute to doing so by ensuring "unfettered access to statutory remedial mechanisms," Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). For

this reason, the Second Circuit has construed them both quite broadly.[7] Compare Bormann, 875 F.2d at 403 (applying an "apparently more stringent" standard to waiver or release), and Pyett, 498 F.3d at 93-94 (union may not waive right to sue on behalf of members), with Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986) (en banc) (applying "ordinary contract principles" to waiver or release), and Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-86 (4th Cir. 1996) (union waiver of right to sue valid).

II. Richardson's Collective Bargaining Agreement

A. The Difference Between the Gardner-Denver Doctrine and the Anti-Retaliation Provision in This Case

Richardson argues that Article 15, Section 10 of the collective bargaining agreement violates the anti-retaliation provision of Title VII. Appellant's Br. at 5

---

[7] For instance, we have held that an employee is protected from retaliation even if he opposes a lawful employment practice, so long he reasonably believed that the practice was unlawful. Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988).

("[T]he contract clause at issue in this case constitute[s] a prima facie case of forbidden retaliation."); id. at 16 (arguing that the collective bargaining agreement reflects "a retaliatory policy"). Because Richardson has misperceived the relationship between the Gardner- Denver doctrine and the anti-retaliation provision, we pause to explain the ways in which they may overlap, and the substantial ways in which they do not.

While both the anti-retaliation provision and the Gardner-Denver doctrine assure "the EEOC's ability to investigate and select cases from a broad sample of claims," see Waffle House, 534 U.S. at 296 n.11; supra (discussing how ensuring access to statutory mechanisms prevents discrimination), each works in a different way. Broadly speaking, the anti-retaliation provision protects employees from particular acts of discrimination that are retaliatory. Indeed, the anti-retaliation provision forbids only "discrimination." See United States v. N.Y. City Transit Auth. (NYC Transit), 97 F.3d 672, 677 (2d Cir. 1996) ("[I]t is important to remember that what the statute actually prohibits is discrimination."). And discrimination claims require courts to consider in detail such variables as the

intent of the employer[8] and how the employer's actions have affected the employee.[9]

The Gardner-Denver doctrine, by contrast, protects employees from certain kinds of company policies that violate Title VII. See, e.g., Cosmair, 821 F.2d at 1089-90 (holding that waiver of right to file charge with EEOC is void as against public policy). As the following analysis demonstrates, the election-of-remedies provision in this case violates neither the

---

[8] See Jute, 420 F.3d at 173 (noting that employee must ultimately show retaliatory motive); cf. James v. N.Y. Racing Ass'n, 233 F.3d 149, 153-54 (2d Cir. 2000) (noting under Title VII's substantive provisions that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated . . . remains at all times with the plaintiff") (emphasis added) (alteration in original).

[9] See Burlington, 548 U.S. at 69 (holding that "the significance of any given act of retaliation will often depend upon the particular circumstances") (emphasis added); see, e.g., id. (noting that "[a] schedule change . . . may make little difference to many workers, but may matter enormously to a young mother with school age children"); see also Oncale v. Sundowner Offshore Servs. , 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships "); Joseph v. Leavitt, 465 F.3d 87, 95 (2d Cir. 2006) (Jacobs, J., concurring).

Gardner-Denver doctrine nor the anti-retaliation provision of Title VII.

B. Article 15, Section 10 of Richardson's collective-bargaining agreement does not violate the Gardner-Denver doctrine.

The Gardner-Denver doctrine does not preclude a union and an employer from agreeing that employees must forego their right to arbitrate a grievance if they bring a lawsuit in federal court arising out of the same facts. In Gardner-Denver, the Supreme Court said in dicta that "there can be no prospective waiver of an employee's rights under Title VII." 415 U.S. at 51.[10] 2001)(noting the tension "between the cases denying preclusive effect to collective bargaining arbitrations, on the one hand, and the cases While we have acknowledged the uncertain descriptive power of this dicta, see Fayer v. Town of Middlebury, 258 F.3d 117, 122 (2d Cir. holding individual arbitration agreements enforceable as against federal statutory and constitutional claims, on the other"),

---

[10] We consider this statement dicta because Gardner-Denver concerned only whether "arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." See Gilmer, 500 U.S. at 35.

Article 15, Section 10 passes muster even under this formulation of the Gardner-Denver doctrine.

Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf.

In fact, Article 15, Section 10 is a rather sensible outcome of the collective bargaining process. It makes sense that an employer might not wish to "retain legal counsel to deal with discrimination claims and take other steps reasonably designed to prepare for and assist in the defense" of a lawsuit while simultaneously preparing for an arbitration hearing on the same issue. Cf. NYC Transit, 97 F.3d at 677. And it also makes sense that a union might want to deploy its scarce resources selectively.

C. Article 15, Section 10 of Richardson's collective-bargaining agreement does not violate the anti-retaliation provision.

Richardson argues that whether or not the election-of-remedies provision violates Gardner-Denver, her union's decision to adhere to that provision after she filed a charge with the CHRO constituted discrimination. As we

have explained, "[t]o establish a prima facie case of retaliation, an employee must show [1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (internal quotation marks omitted). Richardson's claim fails because she has not made a prima facie showing that either agreeing to or adhering to the election-of-remedies provision constitutes an adverse employment action by either her employer or her union. NYC Transit discusses the "adverse employment action" element of a retaliation claim in a context very similar to the one presented here. In that case, defendant-employer New York City Transit Authority ("Transit Authority") established an Equal Employment Opportunity Division to "handle[] employee discrimination complaints through informal settlement and mediation proceedings." 97 F.3d at 674. As a matter of formal policy, however, that forum would refuse to consider a complaint once it became the subject of a lawsuit against the Transit Authority or a "charge filed with a city, state, or federal anti-discrimination agency;" such claims would be handled by the Transit Authority's Law Department. Id. Plaintiffs alleged that this policy constituted "an 'adverse employment action'

within the meaning of Title VII," and the court opined that this was "the only question" in the case. Id. at 677.

At the outset, the court noted its reluctance to interpret the term "adverse" broadly in the context of an employer's litigation of discrimination claims, observing that, "[a]t some level of generality, any action taken by an employer for the purpose of defending against the employee's charge can be characterized as adverse to the employee." Id. It ultimately upheld the policy, holding that "[r]easonable defensive measures do not violate the anti-retaliation provision of Title VII, even though such steps are adverse to the charging employee and result in differential treatment." Id. The court found that the Transit Authority's policy constituted such a reasonable measure because, inter alia, it "avoid[ed] parallel and duplicative proceedings," in the Equal Employment Opportunity and the Law Department, thus allowing the employer's counsel to render effective advice through centralized administration of its litigation. Id. The court also noted that the Transit Authority's defensive measures "d[id] not affect the complainant's work, working conditions, or compensation," and that its "control over the handling of claims against it

serve[d] several essential purposes that have nothing to do with retaliation, malice, or discrimination." Id. The policy embodied by the CBA's election-of-remedies provision also avoids duplicative proceedings in the two for a maintained by the employer for adjudicating claims of discrimination without affecting a complainant's work, working conditions, or compensation. It does not foreclose other avenues of relief, such as the right to pursue claims in federal court which was at issue in Gardner-Denver, or the right to pursue claims with non-CHRO bodies such as the EEOC. Indeed, the CBA does not appear even to foreclose subsequent filing of claims with the CHRO. CBA art. 15, § 10 ("[D]isputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the [CHRO] arising from the same common nucleus of operative fact." (emphasis added)). It only requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance in arbitration.

Accordingly, the election-of-remedies provision seems to qualify as a "reasonable defensive measure" utilized by

Richardson's employer to litigate discrimination claims brought against it effectively and efficiently, and plaintiff fails to persuade us otherwise. Richardson only attempts to distinguish NYC Transit on the ground that complainants here "have a contractual or other entitlement to 'internal claims-handling procedures.'" Appellant's Br. at 7. This entitlement, however, is subject to the employer's permissible, non-discriminatory virtue of the same contract that creates the entitlement: Richardson has no contractual right to internal arbitration if she has filed a charge with the CHRO. Because Richardson has failed to distinguish NYC Transit, she has failed to establish that her employer committed an adverse employment action, an indispensable element of a prima facie case of retaliation under Title VII.

It follows from this conclusion that the union's withdrawal from arbitration once Richardson filed her CHRO charge does not constitute an adverse employment action on the union's part. The union had no contractual obligation to continue pursuing arbitration in those circumstances; indeed, it was contractually obligated to desist. In addition, it would have been futile for the union to

continue to arbitrate because the employer was relieved of its contractual obligation to arbitrate once Richardson filed her claim, and it refused to arbitrate under such circumstances as a matter of policy. We cannot conclude that the union's refusal to persist in a futile act, where the futility is attributable entirely to an employer's reasonable defensive measures, constituted an adverse employment action.

Accordingly, Richardson has failed to establish a prima facie case of retaliation as to the union. Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991), is not to the contrary. We did decide, in that case, that a union's "refusal to proceed with the grievance process" constituted an adverse employment action, even though the employer in Johnson also had a policy of discontinuing internal grievance proceedings once an employee filed a charge with the state anti-discrimination agency. Id. at 206-7. The decision in Johnson, however, was premised on the assumption that the employer, by implementing the policy in question, also violated Title VII's retaliatory provision. Id. at 208 ("We think a plaintiff establishes retaliation by showing that the

union acquiesces in a company policy that abridges the statutory rights of the plaintiff.").

In light of NYC Transit, decided several years after Johnson, such an assumption is not tenable in this case where the employer-the State of Connecticut-employed a reasonable defensive measure to avoid duplicative litigation in the two fora it maintained for addressing claims. Furthermore, we have interpreted Johnson as "hold[ing] that a union's abandonment of a grievance that the union has a contractual responsibility to pursue on the employee's behalf amounts to an adverse employment action." NYC Transit, 97 F.3d at 678. As discussed above, the union had no such obligation here.

Richardson also relies on EEOC v. Board of Governors, 957 F.2d 424 (7th Cir. 1992). In that case, an employer refused to continue with internal grievance proceedings after its employee filed a charge with the EEOC. The grievance proceedings were established by a collective bargaining agreement, which also provided that the employer "ha[d] no obligation to entertain or proceed further with . . . [a] grievance procedure" if the aggrieved

employee filed a charge with any non-arbitral body, such as the EEOC. Id. at 426. In finding that the employer's action violated the ADEA, the Seventh Circuit held that "[a] collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA." Id. at 431.

Our case law does not permit us to follow this holding on the facts of this case. In reaching its conclusion, the Board of Governors court assumes, without explanation, that an employer's decision to withdraw from arbitration constitutes an adverse employment action, even though the language of the CBA explicitly authorizes such action. See id. at 427-28 ("When charged with unlawful retaliation . . ., an employer may offer a legitimate non-discriminatory reason for taking an adverse action against an employee who has engaged in protected activity."). As discussed above, NYC Transit does not permit us to make a similar assumption here. Accordingly, Richardson's reliance on Board of Governors is misplaced.

III. The District Court's Summary Judgment for the CHRO

We turn now to Richardson's other argument on appeal: that the district court improperly entered summary judgment in the CHRO's favor on her disparate treatment and retaliation claims.

Richardson contends that several issues of material fact remain in dispute; in particular, she says that she has produced sufficient evidence to justify a trial on the question of whether the CHRO's asserted justification for the various disciplinary measures it took, and for its ultimate decision to terminate her employment, was legitimate or but a pretext for discrimination and retaliation. Appellant's Br. at 2 4.[11] In conducting this review, we are required to consider the record in the light most favorable to Richardson. Kessler, 461 F.3d at 201.

---

[11] We assume without deciding, as did the district court, that Richardson has presented a prima facie case of disparate treatment and retaliation; we inquire only whether the plaintiff can "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." See Reeves v. Sanderson Plumbing Prods. , 530 U.S. 133, 143 (2000).

On a disparate treatment claim, the "employer [is] entitled to judgment as a matter of law if the record conclusively reveal[s] some . . . nondiscriminatory reason for the employer's decision." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 148 (2000); Getschmann v. James River Paper Co., 822 F. Supp. 75, 78 (D. Conn. 1993), aff'd, 7 F.3d 221 (2d Cir. 1993) (where there is overwhelming evidence that the employer had a legitimate reason to dismiss an employee, the employee must present more than few isolated pieces of contrary evidence to survive summary judgment).

Here, as the district court explained after thoroughly canvassing the record, "there is overwhelming evidence [that the CHRO terminated Richardson's employment due to her] insubordination and hostile behavior."

On her retaliation claim against Appleton and Watts Elder, as with her retaliation claim against the union and the CHRO, Richardson can survive summary judgment if she can show that an issue of fact exists as to whether "a retaliatory motive played a part in the adverse employment actions even if it was not the sole cause." Sumner v. U.S.

Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (emphasis added). But Richardson's broad allegations of retaliation are unsubstantiated by any corroborative evidence. See Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 2001)24 (stating that when the plaintiff has adduced evidence sufficient to constitute a prima facie case, and the employer has articulated a legitimate nonretaliatory reason for the adverse action, the plaintiff must point to evidence that would be sufficient to permit a rational factfinder to conclude that the employer's explanation is a pretext for impermissible retaliation).

Thus, the district court's entry of summary judgment in the CHRO's favor on both claims was proper.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YOR, NY 10007

Dennis Jacobs
CHIEF JUDGE

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of October two thousand and eight

---

Leonyer M. Richardson,
Plaintiff-Appellant,

v.

ORDER
No. 06-0474-cv

Commission on Human Rights & Opportunities, Office of Policy and Management, Cynthia Watts Elder, Leanne Appleton, Linda Yelmini, Donald Bardot and Administrative and Residual Employees Union,
Defendants-Appellees.

Appellant Leonyer Richardson having filed a petition for panel rehearing or, in the alternative, for Rehearing *en banc*, and the panel that determined the appeal having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT DISTRICT OF CONENECTICUT

LEONYER M RICHARDSON
Plaintiff

v. Civil No. 3:02CV0625 (AVC)

STATE OF CONNECTICUT, ET AL.
Defendant

RULING ON THE PLAINTIFF'S MOTION FOR CORRECTED JUDGMENT

This is an action for damages and equitable relief brought in connection with a failed employment relationship. The complaint alleges disparate treatment in employment based on race and retaliation for engaging in protected activity. The action is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and alleges violations of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, et. seq. at §§ 20003e-2 and 3, and the Connecticut Fair Employment Practices Act ("CFEPA"), C.G.S. §§ 46a-58(a), 60 (a) (1), (4) and (5).

The plaintiff, Leonyer M. Richardson, now moves for a corrected judgment addressing count five of the complaint and clarifying whether the court intended to render judgment as a matter of law in favor of Administrative and Residual Employees

Union, Local 4200, CFEPA, AFT, AFL-CIO ("Union"). The issues presented are whether: 1) the Union violated their alleged duty of fair representation; 2) the Union violated Title VII and CFEPA; 3) the Union violated the equal protection clause of the United States Constitution; and, 4) whether the court should have considered the EEOC rulings in its initial ruling.

For the reasons that hereafter follow, the motion for corrected judgment is granted to the extent that the Union is granted judgment as a matter of law.

FACTS

Examination of the complaint, affidavits, pleadings, Rule 56(c) statements, and exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed, material facts.

The plaintiff, Leonyer Richardson, is an African American woman who was employed by the state of Connecticut for many years. In 1981, she began her career as a clerk typist for the Connecticut Department of Environmental Protection ("DEP"). At some point, DEP officials promoted her to the position of fiscal administrative officer. In November of 1997, Richardson left DEP for a fiscal administrative officer position with the Connecticut Office of Policy and Management ("OPM"). Prior to leaving the

DEP, one Richard Clifford, Chief of the Bureau of Outdoor Recreation, gave Richardson a written reprimand for allegedly exhibiting "offensive or abusive conduct . . . [toward] co-workers."

On May 30, 2000, Richardson filed her first complaint of discrimination with the state of Connecticut commission on human rights ("CHRO") against OPM. The complaint alleged Richardson was the victim of a hate crime because her desk had been "ram shacked" repeatedly. The complaint also alleged that her supervisors racially discriminated against her by harassing her in various ways on the job. OPM denied the allegations, and Richardson eventually withdrew her complaint.

On October 6, 2000, Richardson transferred to CHRO, again in the capacity of fiscal administrative officer. Leanne Appleton, a caucasian woman, was assigned as Richardson's direct supervisor.

On February 22, 2001, Appleton issued Richardson a written warning. The warning admonished Richardson for violating a direct order prohibiting computer use with another person's user-id and password. The warning also informed Richardson that Appleton was scheduling a series of meetings to discuss work requirements, and that Richardson had the right to union representation at the meetings.

On April 6, 2001, Appleton once again reprimanded

Richardson with a written warning, asserting that Richardson violated a direct order against contacting the comptroller's office, and another order regarding workplace conduct, including unacceptable e-mail, rude telephone calls, and abrupt notes.

On April 30, 2001, Richardson filed her first grievance against Appleton, accusing her of issuing a written warning without just cause, and of abusive, arbitrary, and discriminatory conduct.

On July 5, 2001, Richardson filed a second grievance against Appleton, again accusing her of being abusive, arbitrary, and discriminatory. According to Richardson, Appleton had singled her out with regard to untimely bank deposits and abuse of sick time.

On July 17, 2001, Appleton issued a third written warning to Richardson, this time alleging a violation of a directive requiring Richardson to explain 52 alleged untimely deposits and her failure to follow comptroller guidelines.

On July 30, 2001, Richardson filed a complaint with CHRO against CHRO alleging that the actions taken by Appleton were both discriminatory and retaliatory. On March 15, 2002, CHRO dismissed the complaint, finding that "there is no reasonable possibility that further investigation will result in a finding of

reasonable cause."

On September 6, 2001, Richardson filed a complaint with EEOC against CHRO. On September 19, 2001, Richardson filed a third grievance, accusing Appleton and CHRO staff of continuing "a pattern of lies, misrepresentations, ostracism, accusations . . . ," and placing a written warning in her personnel file without regard to her contract rights and for singling her out in an arbitrary manner. On October 16, 2001, the then acting executive director of CHRO, Cynthia Watts-Elder, fired Richardson "as a result of her insubordination and offensive conduct towards co-workers and supervisors."

Pursuant to her union contract, Richardson filed a grievance with respect to her job termination. On October 22, 2001, CHRO held a grievance hearing. Upon discovering that Richardson had amended her second complaint against CHRO to include an allegation of race discrimination regarding her termination, the Union withdrew its appeal of her grievance, as complaints of unlawful discrimination filed with CHRO are not subject to arbitration under the union contract.

On April 9, 2002, Richardson filed a complaint with CHRO against the Union, alleging that "in withdrawing its request to arbitrate my grievances because I had filed complaints of

discrimination and retaliation with the CHRO and the EEOC, the union has discriminated against me . . . ." The Union claims that Richardson failed to exhaust her administrative remedies, including: 1) appealing the Union's decision not to proceed to arbitration to the representative assembly, or 2) pursuing the grievance to arbitration as an individual.

On September 4, 2002, CHRO dismissed the amended complaint on the grounds that "the Respondent's actions were in accordance with the union contract."

On April 9, 2002, Richardson filed a fourth complaint with CHRO, this time against OPM, alleging that by executing a collective bargaining agreement with the Union (which provided that her discrimination complaints were not arbitrable if she also filed a CHRO complaint), that "OPM and the union have discriminated against me." On September 4, 2002, CHRO dismissed Richardson's complaint against OPM on the grounds that "there is no reasonable possibility that further investigation could result in a finding of reasonable cause" because "the Respondent's actions were in accordance with the union contract."

On April 18, 2000, Richardson filed this lawsuit. On June 14, 2004, all the defendants, except for the Union, filed a motion for summary judgment. On March 31, 2005, the court granted the

defendant's motion for summary judgment with respect to counts I-IV. However, the opinion failed to address count V regarding the complaint's allegations directed towards the Union.

On April 29, 2005, Richardson filed a notice of appeal with the second circuit court of appeals. Subsequently, on June 20, 2005, Richardson filed a motion for corrected judgment with this court pursuant to F.R.C.P. 54 (b). Furthermore, in "plaintiff's reply to defendant's objection to plaintiff's motion for corrected judgment," Richardson offers two new exhibits. Both exhibits are decisions of the United States equal employment opportunity commission. The first is a determination against the Union finding "that Article 15, Section 10 of the collective bargaining agreement[1] violates Title VII of the Civil Rights Act of 1964, as amended, as applied to Charging Party [Richardson] and any similarly situated employees." The second determination is against OPM and contains the same findings as the first determination against the Union.

---

[1] Article 15, Section 10 provides that "disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the [CHRO] arising from the same common nucleus of operative fact."

On August 4, 2005, the parties agreed that Richardson's appeal was premature, and eventually executed a "Stipulation Withdrawing Premature Appeal" which was apparently filed with the second circuit court of appeals.

STANDARD

Summary judgment is appropriately granted when the evidentiary record shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether the record presents genuine issues for trial, the court must view all inferences and ambiguities in a light most favorable to the non-moving party. See Bryant v. Maffucci, 923 F.2d 979, 982 (2d. Cir.), cert. denied, 502 U.S. 849 (1991). A plaintiff raises a genuine issue of material fact if "the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Rule 56 "provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported

claims . . . [and] it should be interpreted in a way that allows it to accomplish this purpose." Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

DISCUSSION

I. Breach of Duty of Fair Representation

The Union claims that they have not breached their duty of fair representation because they were "simply abiding by the terms of a collectively bargained agreement." The plaintiff makes the conclusory claim that the Union has breached its duty of fair representation, but does not make any further response to the Union's claim.

"[A] union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith . . . [this rule] applies to all union activity." Airline Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 67 (1991) . In addition, "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness . . . as to be irrational." Id.

Viewed in the light most favorable to the plaintiff, it can not be said that the Union's actions in this case were arbitrary, discriminatory, or in bad faith. The Union proceeded according to Article 15, Section 10 of the union contract, which states that

"disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the [CHRO] arising from the same common nucleus of operative fact." This court previously found Article 15, Section 10 of the union contract to be valid under the Federal Arbitration Act.

Furthermore, the record is void of any evidence of discrimination or any retaliatory animus on the Union's part. The Union assisted Richardson in steps 1-3 of the grievance process, then declined to arbitrate because of a contractual provision. The complaint consists of a conclusory allegation that the Union "violated . . . [their] duty of fair representation . . . ." There is no evidence to back up this statement. No reasonable jury could find for the plaintiff given these unsupported claims.

II. Title VII and CFEPA Violations Against the Union

The complaint further alleges that the Union "violated section 704 of Title VII, 42 U.S.C. § 2000e-3 [and] C.G.S. §§ 46a-58(a), 60(a)(4) and (5)." Specifically, the complaint alleges that "because [Richardson] had filed complaints of discrimination and retaliation with the CHRO and the EEOC, the defendant union has discriminated against Ms. Richardson." The Union responds that they did not discriminate against Richardson, and further that she did not exhaust her administrative remedies. "In order to

establish a claim under Title VII stemming from a union's breach of its duty of fair representation, a plaintiff must show (1) that the employer committed a violation of the collective bargaining agreement, (2) that the union permitted the violation to go unrepaired, thus, breaching its duty of fair representation, and (3) that the union was motivated by racial animus." Coggins v. 297 Lennox Realty Co., No. 96-9062, 1997 WL 138781, at *2 (2d Cir. March 18, 1997) (citing Bugg v. International Union of Allied Indus. Workers, Local 507, 674 F.2d 595, 598 n.5 (7th Cir. 1982), cert. denied, 459 U.S. 805 (1982)).

Even if the employer in this case committed a violation of the collective bargaining agreement, the plaintiff can not satisfy the second prong of this test because the Union did not breach its duty of fair representation. The Union proceeded under a contractual provision, legal under the FAA, which states that "disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint

is filed with the [CHRO] arising from the same common nucleus of operative fact."[2] Because the Union did not breach its duty of fair representation, it did not violate Title VII.

The plaintiff has also failed to raise a genuine issue of material fact with regard to her CFEPA claim. Title VII claims and CFEPA claims are generally analyzed under the same framework. See State v. Commission on Human Rights and Opportunities, 211 Conn. 464, 469-70 (1989). Thus, if a plaintiff fails to raise a genuine issue of material fact with regard to a violation of Title VII, she will not be able to raise a genuine issue of material fact with regard to a violation of CFEPA. The CFEPA claim therefore fails for the same reasons the Title VII claim fails.

---

[2] Moreover, the Union claims that Richardson did not exhaust her administrative remedies under the union contract. Richardson failed to respond to this claim. See Briones v. Runyon, 101 F.3d287, 289 (2d Cir. 1996)("Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion."). In particular, Richardson could have appealed the Union's decision not to proceed to the representative assembly, or she could have pursued the grievance to arbitration as an individual.

III. §§ 1983 and 1981 Claims

The complaint further alleges that "[t]he union's actions violated Ms. Richardson's rights to be treated the same as white citizens as protected by 42 U.S.C. § 1981, her property rights to continued employment and her rights to due process and equal protection of the laws as protected by the Fourteenth Amendment to the U.S. Constitution as enforced through 42 U.S.C. § 1983 . . . ." The Union denies liability under either §§ 1981 or 1983.

As the court stated in its previous ruling on the defendant's motion for summary judgment, the elements of a § 1983 claim parallel those of a Title VII claim. "The elements of one are generally the same as the elements of the other and the two must stand or fall together." See Feingold v. New York, 366 F.3d 138, 159 (2d Cir. 2004). Because Richardson has failed to raise a genuine issue of material fact as to her Title VII claim against the Union, both her §§ 1983 and 1981 claims fail.

Furthermore, the § 1981 claim fails because "[t]he express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." Patterson v. County of Oneida, 375 F.3d 206, 225 (2d Cir. 2004). Moreover, "[most of the core substantive standards that apply to claims of discriminatory

conduct in violation of Title VII are also applicable to claims of discrimination in employment in violation of § 1981 of the Equal Protection Clause . . . and the factors justifying summary dismissal for termination of [Richardson's] employment equally support the summary dismissal of [her] claims for termination brought under 42 U.S.C. §§ 1981 and 1983. Patterson v. County of Oneida, 375 F.3d 206, 226 (2d Cir. 2004). Therefore, because Richardson has failed to raise a genuine issue of material fact in regards to her Title VII claim, both her §§ 1981 and 1983

claims must fail as well.

IV. The EEOC determinations

The complaint further alleges that "the court should not grant summary judgment to the Union without taking into consideration all of the relevant case law and Administrative Rulings relative to this case [including the EEOC rulings]."[3] The Union claims that the EEOC rulings are not binding on the court, and that summary judgment should be granted.

The EEOC rulings that Richardson now claims are central to this case have no binding effect on this court. See Green v. Harris Publications, 331 F.Supp.2d 180, 195 (S.D.N.Y. 2004) ("Even assuming the EEOC's conclusion that plaintiff was constructively discharged because of his race is admissible, the EEOC

determination is not binding, and on the record before the Court, no reasonable jury could find a constructive discharge."). Furthermore, the court fails to see why Richardson did not introduce the EEOC rulings earlier in her case if she considered them so important to proving the complaint's allegations. They became available in April 2003, while this court did not enter its initial ruling until March 31, 2005. Nonetheless, the EEOC rulings do not create a genuine issue of material fact. The court therefore grants the motion for corrected judgment to the extent that the Union is granted judgment as a matter of law.

---

[3] Defendant OPM motioned to strike portions of the plaintiff's reply memorandum in support of its rule 54 motion. Apparently, Richardson wants the court to reexamine its ruling granting summary judgment to OPM in light of the newly introduced EEOC rulings. The court declines to reexamine its initial judgment, as Rule 54(b) is not a proper basis for modifying such a judgment.

CONCLUSION

For the reasons stated herein, the motion for corrected judgment is granted to the extent that the Union is granted judgment as a matter of law.

It is so ordered, this 23rd day of November 2005 at Hartford, Connecticut.

/s/

Alfred V. Covello
United States District
Judge

No. 08-1226

IN THE
SUPREME COURT OF THE UNITED STATES

LEONYER RICHARDSON,

Petitioner,

v.

STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF POLICY AND MANAGEMENT, CYNTHIA WATTS ELDER, LEANNE APPLETON, LINDA YELMINI, DONALD BARDOT, and A. & R. EMPLOYEES UNION LOCAL 4200,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

STATE OF CONNECTICUT RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

*JOSEPH A. JORDANO
DAVID M. TEED
Assistant Attorneys General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5340

* Counsel of Record

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether an election of remedies provision in a collective bargaining agreement, that requires an employee with a state law claim of discrimination to choose between arbitration or the state civil rights agency and state court, violates the anti-retaliation section of Title VII?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

COUNTER-STATEMENT OF THE CASE

In this action the petitioner, Leonyer Richardson, asks this Court to review the Second Circuit Court of Appeals' decision affirming summary judgment for the Respondents, on the grounds that an election of remedies clause in a collective bargaining agreement does not violate the anti-retaliation provision in Title VII of the Civil Rights Act of 1964. The plaintiff fully litigated all of her claims in federal court and she lost on all counts.

Contrary to the petitioner's arguments, this case certainly does not involve an issue of profound national importance. The petitioner argues that as a result of the decision below by the Second Circuit Court of Appeals in this case, there is now a conflict between the Seventh Circuit Court of Appeals and the Second Circuit. This is simply not true. As the Second Circuit noted in its decision, the facts and the law in the present case are so different from those in the Seventh Circuit case, a different result was required.

Furthermore, this court has recognized the validity of choice of forum provisions in union agreements for resolving discrimination claims. Lastly, the district court's ruling on the merits, that the plaintiff was not discriminated or retaliated

against because she was dismissed for workplace misconduct, renders the relief sought in this Court to simply be an advisory opinion.

A. Factual Background

On page two of its decision below, the U.S. District Court found that "[e]xamination of the complaint, affidavits, pleadings, Rule 56(c) statements, and exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed material facts." (Respondent's Appendix p. 2, hereinafter App.) The facts found by the District Court include the following.

The plaintiff was employed by the defendant Commission on Human Rights and Opportunities (hereinafter CHRO) as a fiscal administrative officer beginning on October 6, 2000. (App., p. 3) Prior to that time, the plaintiff had been employed by two other state agencies, the first of which was the Department of Environmental Protection (DEP). Id. While at DEP, the plaintiff first met the defendant Cynthia Watts Elder, also an African American woman, who later became the Executive Director of CHRO. Id. Also while at DEP, the plaintiff was reprimanded for threatening her co-workers. Id. In November of 1997, on a recommendation from Watts-Elder, the plaintiff transferred from DEP to the defendant Office of Policy and Management (OPM) as a fiscal

administrative officer. Id. On May 30, 2000, the plaintiff filed a complaint with CHRO against OPM, alleging that her OPM supervisors were harassing her in various ways on the job. Id. Watts Elder then agreed to accept the plaintiff as a transfer employee from OPM to CHRO on October 6, 2000. Id. The defendant Leanne Appleton was assigned as the plaintiff's direct supervisor. Id. In Watts Elder's view, Appleton is a highly competent business manager. Id. Immediately upon her arrival at CHRO, the plaintiff began to exhibit misbehaviors similar to those at DEP and OPM, and on February 22, 2001, Appleton issued plaintiff a written warning for violating the security of the computer system. (App., p. 4) On April 6, 2001 Appleton issued plaintiff another written warning for several incidents of workplace misconduct. Id. On July 17, 2001, Appleton issued plaintiff a third written warning for failing to explain 52 untimely deposit slips and failure to follow state guidelines. (App., p. 6)

Watts Elder hired one Herbetia Williams, an African American woman, to investigate the plaintiff's alleged misconduct. (App., p. 6) Later in July of 2001, Ms. Williams submitted her report, finding that plaintiff had engaged in willful misconduct, that she had violated the Workplace Conduct Policy, and that plaintiff's behavior had created a hostile and chilling work environment. Id. In addition, Ms. Williams specifically found

that the plaintiff had exhibited the following misbehaviors: "screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk." Id. The plaintiff filed a complaint against CHRO with the CT Auditors of Public Accounts, challenging Ms. Williams' investigation and her qualifications, but the Auditors dismissed this complaint. (App., p. 8) Watts Elder suspended the plaintiff on August 6, 2001 for 10 days without pay based on her offensive and abusive conduct towards co-workers, theft, misuse of state funds, property and equipment. (App., p. 7)

On July 30, 2001, the plaintiff filed a CHRO complaint alleging that the actions taken by Appleton were discriminatory and retaliatory. Id. Said complaint was dismissed on March 15, 2002 on the grounds that "there is no reasonable possibility that further investigation will result in a finding of reasonable cause." Id.

As the Second Circuit Court of Appeals noted in its decision in this case, "Between July 30 and October 16, 2001, the conflict between Richardson and Appleton escalated both in intensity and breadth . . . Finally, on October 16, 2001 Watts Elder terminated Richardson's employment with the CHRO." (Petitioner's Appendix, Exhibit A, p. 6. Hereinafter Pet. App.)

Richardson then sought the assistance of her union (also a defendant in this case) in grieving her termination. Id. In addition, the plaintiff again amended her CHRO charge, alleging that Watts Elder had only terminated her for the purpose of retaliating against her. Id. Upon discovering that Richardson had filed a CHRO complaint regarding her termination, the union withdrew its appeal of her grievance (to arbitration), because Article 15 Section 10 of the Collective Bargaining Agreement (hereinafter CBA) provided that disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with [CHRO] arising from the same common nucleus of operative fact." (Pet. App. Exh. A p. 6-7) The plaintiff then filed yet another charge with CHRO on April 9, 2002 alleging that her union's refusal to seek arbitration constituted an independent act of retaliation. Id.

In its decision, the District Court found that shortly after the plaintiff was fired, she applied for unemployment benefits, which CHRO contested on the grounds that she was fired for misconduct. (App. p. 9) The issue of whether or not the plaintiff was fired for willful misconduct was brought before Connecticut's Employment Security Appeals Division by plaintiff's attorney. Hearings were held, and witnesses (including plaintiff) testified and were cross-examined. Id. The District Court noted that the Appeals Referee concluded as follows:

> the employer, Commission on Human Rights and Opportunities – State of Connecticut, discharged the claimant, Leonyer M. Richardson, for *deliberate misconduct which constituted willful misconduct* in the course of her employment. As a result, the claimant [Richardson] is disqualified from receiving unemployment compensation benefits . . ." (emphasis added.) (App. 9-10)

On Appeal, the Board of Review issued a 6 page decision which affirmed the Referee's ruling in full. (App., p. 10)

The District Court noted that many different fact finders had investigated the plaintiff's allegations and found them to be without merit (App. 14-15). The Court also noted another fact that was particularly troublesome:

> Particularly troublesome to Richardson's case is the fact that her several suspensions and job termination were at the behest of Watts-Elder, herself an African American woman, but more importantly, the same person who recommended Richardson to the OPM in 1997 and then facilitated Richardson's transfer to the CHRO in 2000. (App., p. 15)

The District Court also noted that the plaintiff filed a complaint with EEOC on September 6, 2001, (App., p. 7) and that the plaintiff filed this action in the U.S. District Court on April 18, 2002. (App. p. 10)

The Second Circuit Court of Appeals later found these facts to be important:

> Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf. (Pet. App. Exh. A, p. 20)

Since the plaintiff's rights to file with EEOC (which she did) and in federal court (which she did) were never impacted by her CBA, the Second Circuit concluded that her CBA "passes muster even under this formulation of the Gardner-Denver doctrine." (Pet. App. Exh. A, p. 20).

The District Court noted that plaintiff's union claimed that plaintiff failed to exhaust her administrative remedies under her union contract, and that plaintiff failed to respond to this claim:

> Moreover, the Union claims that Richardson did not exhaust her administrative remedies under the union

> contract. Richardson failed to respond to this claim. See Briones v. Runyon, 101 F.3d 287, 289, (2d Cir. 1996) ("Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion."). In particular, Richardson could have appealed the union's decision not to proceed to the representative assembly, or she could have pursued the grievance to arbitration as an individual. (Pet. App. Ex. C, p. 12 fn. 2)

In its two rulings, the District Court dismissed plaintiff's Title VII retaliation claims against the union, OPM, and CHRO, along with all of her other Title VII claims, state laws claims, and constitutional claims (including those against all of the individual defendants). (App., p. 15-28, and Pet. App. Ex. C, p. 10-16).

The District Court noted that recent U.S. Supreme Court cases (decided after Board of Governors) hold that the Federal Arbitration Act 'does not require parties to arbitrate when they have not agreed to do so.' EEOC v. Waffle House, 534 U.S. 279, 293 (2002)." (App. p. 24) Thus, the District Court held that the CBA election of remedies provision in the present case (Art. 15, Sec.10)
"does not violate the FAA." *Id.*

The Second Circuit Court of Appeals affirmed the District Court decision in all respects, noting that the plaintiff's broad allegations of retaliation were completely unsubstantiated by any evidence:

> Here, as the district court explained after thoroughly canvassing the record, "there is overwhelming evidence [that the CHRO terminated [*126] Richardson's employment due to her] insubordination and hostile behavior."
>
> On her retaliation claim against Appleton and Watts Elder, as with her retaliation claim against the union and the CHRO, [HN14] Richardson can survive summary judgment if she can show that an issue of fact exists as to whether "a retaliatory motive *played a part* in the adverse employment actions even if it was not the sole [**29] cause." *Summer v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)* (emphasis added). But Richardson's broad allegations of retaliation are unsubstantiated by *any* corroborative evidence. (Pet. App. Ex. A, p. 29-30)

(As noted infra, this finding is yet another important difference between the present case and the Seventh Circuit decision. There are many.)

REASONS FOR DENYING THE PETITION

A. There Is No Conflict Between the Circuits

The main argument that the petitioner has offered as to why this Court should grant certiorari is that there is a conflict between the Second Circuit's decision below with the Seventh Circuit's decision in *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1991) (hereinafter *Board of Governors*). This is simply not the case. The Second Circuit specifically discussed the many differences between this case and *Board of Governors, supra*, and concluded as follows:

> "Our case law does not permit us to follow this holding [*EEOC v. Board of Governors*] on the facts of this case." (emphasis added.)

The differences between these two cases are substantial with respect to both the law and the facts.

1. These two cases involve different statutes.

Board of Governors, supra, arose under the ADEA, and not under Title VII, as did the present case. Thus, to begin with, these two Courts of Appeals were dealing with different anti-retaliation

provisions which contain different language. The ADEA anti-retaliation provision states that:

> It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

By contrast, Title VII's anti-retaliation provision provides in pertinent part as follows:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a)

In addition to these different statutory provisions, (which have produced their own case law) the

CBA provisions in these two cases are very different.

2. These two cases dealt with different CBA provisions.

a. The election of remedies provisions

In *Board of Governors*, *supra*, the Seventh Circuit had to interpret a CBA provision which was much more broad in its scope than the narrowly worded CBA provision in the present case. Specifically, the CBA provision in *Board of Governors* reads as follows:

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this [**5] grievance procedure. (emphasis added).

This CBA provision clearly states that if an employee files a complaint in any other administrative forum (such as the EEOC) or in any other judicial forum (such as federal court), the employer then had no obligation to proceed further with the grievance procedure. This language gave the employer complete discretion as to whether or not to proceed with the grievance procedure after

an employee had filed a complaint in another forum. Obviously, such a provision would raise questions about the employer's motive for allowing the grievance to proceed in some cases, but not in others.

By contrast, the CBA provision in the present case only dealt with state law claims and CHRO complaints, and did not penalize the plaintiff in any way for filing federal law claims in complaints with the EEOC or in federal court. The CBA in the present case provides as follows in Article 15 Section 10:

> disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the same common nucleus of operative fact.

The Second Circuit Court of Appeals found that it was very significant that this CBA provision had no impact whatsoever on plaintiff's ability to file with EEOC or in federal court. In the present case, the plaintiff did file with the EEOC and then in federal court, which the Second Circuit noted. (see p. 5 supra.)

Thus, the CBA in the present case only involves state laws claims brought before CHRO,

and not federal claims brought to EEOC or federal court. Indeed, the Title VII retaliation provision only protects federal claims filed with EEOC or in federal court, and not state law claims raised at CHRO.

Moreover, the defendant employer and the defendant union in the present case had no discretion about whether to continue with arbitration if a CHRO complaint was filed either before or after the grievance. Thus, the Second Circuit held that there was no "adverse action" by either the union or the employer:

> Richardson's claim fails because she has not made a prima facie showing that either agreeing to or adhering to the election-of-remedies provision constitutes an adverse employment action by either her employer or her union. (Petitioner's Appendix A, p. 21.)

By contrast, the CBA in *Board of Governors* required the employer to make a conscious decision, in every single individual case, about whether or not to proceed with the grievance procedure after a complaint had been filed "in any other forum, whether administrative or judicial". Id. In *Board of Governors*, the employer exercised that discretion by deciding not to allow the employee to proceed with the grievance process immediately after that employee filed his

complaint with EEOC. (In the present case, nothing whatsoever happened to the plaintiff when she filed her EEOC complaint, or when she filed her federal court action. The CBA in the present case only applied to plaintiff's CHRO complaint in which she raised her state law claims.)

b. The exhaustion provisions

The CBA in the present case allowed the plaintiff to pursue her grievance to arbitration as an individual (unlike the CBA in the *Board of Governors* case). Furthermore, the CBA in the present case allows its members (including plaintiff) to appeal to the Union's representative assembly in any case in which the Union does not proceed to arbitration (again, unlike the CBA in *Board of Governors*). The District Court held that the plaintiff failed to exhaust her administrative remedies under the union contract, and also failed to respond to the Union's defense of exhaustion:

> Moreover, the Union claims that Richardson did not exhaust her administrative remedies under the union contract. Richardson failed to respond to this claim. *See Briones v. Runyon*, 101 F.3d 287, 289 (2d Cir. 1996) ("Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion."). In particular, Richardson could have appealed the Union's decision not to

> proceed to the representative assembly, or she could have pursued the grievance to arbitration as an individual.

Petitioner's Appendix C, p. 12 fn 2.

The plaintiff in Board of Governors had no such options.

3. The Case law has changed since *Board of Governors* was decided.

Seventeen years ago when *Board of Governors* was decided, the Seventh Circuit Court of Appeals relied heavily upon *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). However, the *Gardner-Denver* doctrine, as it has become known since then, had not developed at that time.

When the Second Circuit decided the present case, it had the benefit of many more recent decisions from this Court explaining how *Gardner-Denver* should be applied. For example, cases such as *Circuit City v. St. Clair Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), *EEOC v. Waffle House*, 534 U.S. 279, 122 S.Ct. 754, 151 L. Ed. 2d (2002) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) are significant developments in the law which were decided after *Board of Governors*.

B. A Collective Bargaining Agreement Can Contain An Election of Remedies Provision Under Federal Law.

Petitioner's contention that the holding in *Gardner-Denver* made the election of remedies illegal in the context of the enforcement of employee statutory rights has now been answered to the contrary by this court. In *14 Penn Plaza v. Pyett*, ____ U.S. ____, 129 S.Ct. 1456, 2009 U.S. LEXIS 2497 (U.S. April 1, 2009), the plaintiff-employee bypassed a mandatory arbitration provision in the union contract and filed an age discrimination action in federal court. Interpreting *Gardner-Denver* to prohibit the waiver of federal claims, the District Court refused to compel arbitration, and the Second Circuit held that *Gardner-Denver* forbids the enforcement of collective bargaining provisions requiring the mandatory arbitration of ADEA claims. Recognizing the validity of such provisions that preclude resolution of discrimination claims in a federal judicial forum, this court stated: "As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained for exchange." *Id., at 1464. See also, NRLB v. Magnavox, Co.*, 415 U.S. 322, 328 (1974).

Under the ruling in *14 Penn Plaza*, the State of Connecticut and Local 4200 could have agreed to mandatory arbitration to resolve all claims of discrimination under both state and federal law. The current less burdensome provision in the CBA that gave the plaintiff a choice of forums to resolve her state law claim (either through arbitration or a CHRO complaint) leaving her free to pursue her federal rights through several forums must necessarily be valid.

The Petitioner contends that a choice of forum provision that limits a union employee's choices to either arbitration or state court (after filing a CHRO complaint) to resolve only a state law discrimination claim, violates Title VII's anti-retaliation provision. She is wrong. The *14 Penn Plaza* ruling grants employers and unions broad discretion to voluntarily fashion a procedure for resolving discrimination complaints that expressly limit multiple forums.

This point was made clear by this Court in *14 Penn Plaza* as follows:

> We recognize that apart from their narrow holding, the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

Id., at 1469.

The more recent rulings of this Court, such as Circuit City, Wright, and EEOC v. Waffle House, supra, (and especially the most recent ruling in 14 Penn Plaza) have modified the *Gardner-Denver* doctrine such that the CBA choice of forum provision in the present case certainly "passes muster", as the Second Circuit stated below. (Pet. App. Ex A, p. 20). These cases incrementally recognized the validity of election of remedies and choice of forum provisions under the Federal Arbitration Act.

Employers and unions are now free to use such provisions to resolve discrimination and retaliation claims within the limits set by this Court. As this Court has recognized, the economics of dispute resolution creates enormous pressure on employers and unions to maximize efficiencies and limit the duplication of resources. *Circuit City v. St. Clair Adams*, 532 U.S. 105, 123, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). In the present case the union and employer declined to expend resources on dual proceedings that could produce inconsistent results for state law claims that could be resolved in either of two forums.

The narrowness of the petitioner's argument cannot be over emphasized. Under the CBA provision at issue in this case, employees have access to both the EEOC and a federal judicial forum in which to fully litigate federal claims under Title VII, as well as a CHRO complaint or

arbitration for the state law claims. The Petitioner (Richardson) utilized the federal courts to litigate her discrimination and retaliation claims on the merits. The District Court expressly found that there was "overwhelming evidence" showing that the plaintiff was disciplined and then terminated for the legitimate non-retaliatory and non-discriminatory reason of her repeated workplace misconduct. The Second Circuit affirmed, and this is now the law of this case.

C. The Petitioner Essentially Seeks an AdvisoryOpinion Because The District Court Ruled That The Defendants Have No Liability Under Title VII.

Not only does *14 Penn Plaza* expressly permit choice of forum provisions in collective bargaining agreements, (thus destroying petitioner's *Gardner-Denver* argument) but the petition should also be denied for the reason that the uncontested law of the Petitioner's case renders moot the relief sought in the petition for certiorari. This court does not issue advisory opinions. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L.Ed. 2d 265, 120 S.Ct. 1382 (2000). The justiciability of a claim is moot when the issues are no longer "live." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L.ed. 2d 642, 99 S.Ct. 1379 (1979). When a dispositive ruling in a particular case

renders the controversy moot this court will necessarily decline to hear the case.

In *Ashcroft, Attorney General of Missouri v. Mattis*, 413 U.S. 171, 97 S.Ct. 1739, 52 L.Ed. 2d 219 (1977), the father of a boy killed by police officers, when he attempted to escape arrest sued under 42 U.S.C. § 1983, seeking monetary damages and declaratory relief that Missouri statutes authorizing police to use deadly force were unconstitutional. The district court denied both forms of relief on the ground of qualified immunity. Plaintiff only appealed the denial of declaratory relief. In a per curiam opinion this court denied the petition because the issue of the defendant's liability had been decided. Any declaratory ruling about the Missouri statute would not provide the plaintiff with any affirmative relief.

An analogous situation exists in the present case. The District Court found that Richardson was dismissed from her job for the legitimate non-retaliatory reason of her workplace misconduct. Her claim under Title VII having been fully resolved on its merits, a ruling about the validity of the CBA provision amounts to an advisory opinion. Even if this court were to rule that the challenged provision could be retaliatory, the plaintiff is still judicially bound by the finding that she was fired for cause.

CONCLUSION

For all the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

RESPONDENT

*JOSEPH A. JORDANO
DAVID M. TEED
Assistant Attorneys General
OFFICE OF THE
ATTORNEY GENERAL
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5340

Counsel for the Respondent,
Richard Blumenthal,
Attorney General for the
State of Connecticut

*Counsel of Record

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Leonyer M. Richardson Plaintiff	:	
VS.	:	
STATE OF CONNECTICUT COMMISSION ON HUMAN RIGHTS, OFFICE OF POLICY AND MANAGEMENT, CFEPE-AFT, AFL-CIO, ET AL. Defendants	:	Civil No. 3:02CV0625 (AVC)

RULING ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 31, 2005)

This is an action for damages and equitable relief brought in connection with a failed employment relationship. The complaint alleges disparate treatment in employment based on race and retaliation for engaging in protected activity. The action is brought pursuant to 42 U.S.C. §§ 1981 and 1983 and alleges violations of the Fourteenth Amendment to the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, *et. seq.* at §§ 2000e-2 and 3, and the Connecticut Fair Employment Practices Act ("CFEPA"), C.G.S. §§ 46a-58(a), 60(a)(1), (4) and (5).

The defendants, State of Connecticut Commission on Human Rights ("CHRO"), Office of Policy and Management ("OPM"), Leanne Appleton, and Cynthia

Watts-Elder now move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment asserting that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. The issues presented are whether the plaintiff, Leonyer M. Richardson, has raised a genuine issue of material fact: (1) that the defendant, CHRO, has violated Title VII under the theories of disparate treatment and retaliation; (2) whether the defendants, Appleton and Watts-Elder have violated Richardson's rights as secured by the equal protection clause of the Fourteenth Amendment to the United States Constitutional [sic] and 42 U.S.C. § 1981; (3) whether the defendant, OPM, has violated Title VII under the aforementioned theories; and (4) whether the CHRO and the OPM have violated the CFEPA.

For the reasons that hereafter follow, the motion is GRANTED.

FACTS

Examination of the complaint, affidavits, pleadings, Rule 56(c) statements, and exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed, material facts.

The plaintiff, Leonyer Richardson, is an African American woman who has been employed by the state of Connecticut for many years. In 1981, she began her career as a clerk typist for the Connecticut Department of Environmental Protection ("DEP"). At

some point, DEP promoted her to the position of fiscal administrative officer. In 1997, Richardson left DEP for a position with the Connecticut Office of Policy and Management ("OPM"). Just prior to leaving, one Richard Clifford, Chief of the Bureau of Outdoor Recreation, gave Richardson a written reprimand for allegedly exhibiting "offensive or abusive conduct toward . . . co-workers." While at the DEP, Richardson met the defendant, Cynthia Watts-Elder, also an African American woman. Watts-Elder later became Richardson's senior supervisor at the CHRO.

In November of 1997, on a recommendation from Watts-Elder, Richardson transferred to OPM as a fiscal administrative officer. On May 30, 2000, Richardson filed her first complaint of discrimination with CHRO against the defendant, OPM, in which she alleged being the victim of a hate crime because her desk had been "ram shacked" repeatedly. The complaint also alleged that her supervisors racially discriminated against her by harassing her in various ways on the job. OPM denied every one of the allegations. Richardson eventually withdrew her complaint.

In 2000, Watts-Elder, who was then acting Executive Director of CHRO, agreed to accept Richardson as a transfer employee from OPM. On October 6, 2000, Richardson transferred to CHRO, again in the capacity of fiscal administrative officer. The defendant, Leanne Appleton, a caucasian woman, was assigned as Richardson's direct supervisor. In Watts-Elder's view, Appleton is a highly competent business manager. According to Richardson, however, many of

Appleton's employees felt as though Appleton was discriminatory and demeaning.

On February 22, 2001, Appleton issued Richardson a written warning. The warning admonished Richardson for violating a direct order prohibiting computer use with another person's user-id and password. The warning also informed Richardson that Appleton was scheduling a series of meetings to discuss work requirements, and that Richardson had the right to union representation at these meetings.

On April 6, 2001, Appleton once again reprimanded Richardson with a written warning, asserting that she violated a direct order against contacting the comptroller's office, and another order regarding workplace conduct, including unacceptable e-mail, rude telephone calls, and abrupt notes.

On April 30, 2001, Richardson filed her first grievance against Appleton, accusing her of issuing a written warning without just cause, and of abusive, arbitrary, and discriminatory conduct.

In May, 2001, a dispute arose between Richardson and Appleton regarding the proper method for calculating energy consumption in various reports. According to Richardson, Appleton's calculations resulted in the misappropriation of funds from CHRO. After consulting with OPM, Appleton informed Richardson that the method Richardson had been using was incorrect and to use the correct formula in all future calculations.

On July 3, 2001, a dispute arose between Richardson and Appleton concerning Richardson's method of making bank deposits. On the same day, Richardson sent the following e-mail to Watts-Elder defending her position:

> I have proof that the deposits have always been done this way. I have made deposits according to what I was told to do when I first arrive here [sic], and that was "we (CHRO) do not do things like OPM does." I was told to make deposits based on receiving monies that was $500.00 or more. When I began to explain that I use [sic] to do deposits every week at OPM, it was then I was told that CHRO does things differently.
>
> Remember in the meeting we had with [Appleton], you and myself. She quoted that state [sic]
>
> This is retaliation on Leanne Appleton's part. She wants to make this a [Richardson's] issue, when in actuality, [Appleton] is responsible for allowing this to happen prior years.
>
> The last audit shows that. I probably have made deposit [sic] correctly than anyone before me. At least, I have done the deposits on a regular time fame [sic].
>
> This business office has been run terribly. I have never seen anything like it before in all of my 20 some years of state service.
>
> [Richardson]

On July 5, 2001, Richardson filed a second grievance against Appleton, again accusing her of being abusive, arbitrary, and discriminatory. According to Richardson, Appleton has singled her out with regard to untimely bank deposits and abuse of sick time. Richardson claims that another CHRO employee, one Kathy Stone, was also accused of making untimely bank deposits but was not disciplined.

On July 17, 2001, Appleton issued a third written warning to Richardson, this time alleging a violation of a directive requiring Richardson to explain 52 alleged untimely deposits and her failure to follow comptroller guidelines.

Meanwhile, Richardson's ultimate supervisor, Watts-Elder, hired one Herbetia Williams, an African American woman, to investigate Richardson's alleged misconduct. Later in July of 2001, Williams submitted her report, finding that Richardson had engaged in willful misconduct, stating:

> (1). [Richardson's] behavior clearly violates the Workplace Conduct Policy.
>
> (2). [Richardson's] behavior has created a hostile and chilling work environment.
>
> Examples include: screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk.

On July 30, 2001, Richardson filed a complaint with CHRO against CHRO alleging that the actions[1] taken by Appleton were both discriminatory and retaliatory. The CHRO dismissed the complaint on March 15, 2002 finding that "there is no reasonable possibility that further investigation will result in a finding of reasonable cause."

From August 6, 2001, to August 20, 2001, Watts-Elder placed Richardson on administrative leave for 10 days, this time without pay, alleging "offensive and abusive conduct towards co-workers, theft, misuse of state funds, property, or equipment. On August 20, 2001, when Richardson returned, Appleton asked her to prepare the August Energy Consumption Report using the correct calculation.

On September 19, 2001, Richardson responded by filing a third grievance accusing Appleton and CHRO staff of continuing "a pattern of lies, misrepresentations, ostracism, accusations . . . ," and placing a written warning in her personnel file without regard to her contract rights and for singling her out in an arbitrary manner. On September 6, 2001, Richardson also filed a complaint with EEOC against CHRO. On October 16, 2001, Watts-Elder fired Richardson "as a

---

[1] In her complaint, Richardson alleges "I have been discriminated against by Ms. Appleton because I have encountered 'character assassination' of her 'hostile, abusive, harassment, retaliation and arbitrary conduct against me in the workplace.'"

result of her insubordination and offensive conduct towards co-workers and supervisors."

Pursuant to her union contract, Richardson filed a grievance with respect to her job termination. On October 22, 2001, a hearing was held. Upon discovering that Richardson had amended her second complaint against CHRO to include an allegation of race discrimination regarding her termination, Richardson's union, A & R Local 4200 ("A & R"), withdrew its appeal of her grievance, as complaints of unlawful discrimination filed with CHRO are not subject to arbitration under the union contract.

On February 7, 2002, Richardson filed a complaint with the Auditors of Public Accounts ("APA") against CHRO alleging that CHRO violated state law by assigning Williams, who was not licensed as an investigator in Connecticut, to conduct the investigation of July, 2001, that resulted in a finding of willful misconduct. In response, the APA concluded that "a license is not required to review personnel matters, which apparently was what [Williams] did"

On April 9, 2002, Richardson filed a complaint with CHRO against her union (A & R Local 4200), alleging that "in withdrawing its request to arbitrate my grievances because I had filed complaints of discrimination and retaliation with the CHRO and the EEOC, the union has discriminated against me . . ." On September 4, 2002, CHRO dismissed the amended complaint on the grounds that "the Respondent's actions were in accordance with the union contract."

On April 9, 2002, Richardson filed a fourth complaint with CHRO, this time against OPM alleging that by executing a collective bargaining agreement with the A & R union (which provided that her discrimination complaints were not arbitrable if she also filed a CHRO complaint), that "OPM and the union have discriminated against me." On September 4, 2002, CHRO dismissed Richardson's complaint against OPM on the grounds that "there is no reasonable possibility that further investigation could result in a finding of reasonable cause" because "the Respondent's actions were in accordance with the union contract."

Shortly after Richardson was fired, she applied for unemployment benefits, which were contested by CHRO on the grounds that Richardson was fired for misconduct. The issue of whether CHRO discharged Richardson for willful misconduct was brought before the state of Connecticut Employment Security Appeals Division ("SAD"). Hearings were held before Appeals Referee Lee Ellen Terry, in which many witnesses testified under oath and were cross-examined by counsel. Richardson was represented by her attorney. Following an extensive investigation, the Appeals Referee concluded that:

> the employer, Commission on Human Rights and Opportunities – State of Connecticut, discharged the claimant, Leonyer M. Richardson, for *deliberate misconduct which constituted willful misconduct* in the course of her employment. As a result, the claimant

> [Richardson] is disqualified from receiving unemployment compensation benefits . . ."

On Appeal, the Board of Review issued a 6 page decision which affirmed the Referee's ruling in full.

On April 18, 2000, Richardson filed this lawsuit.

STANDARD

On a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute, and that it is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute regarding a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965, 113 S.Ct. 440, 121 L.Ed.2d 359 (1992) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991).

DISCUSSION

I. Count I: Title VII Violations Against The CHRO.

The complainant alleges Title VII violations against CHRO under two theories: (1) disparate treatment; and (2) retaliation for engaging in protected activity. The court considers each in turn.

1. Disparate Treatment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race . . . " 42 U.S.C. § 2000e-2(a)(1).

The analysis for a disparate treatment claim, which requires proof of discriminatory intent or motive, is governed by the well known *McDonnell Douglas* framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court has summarized the procedure as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision] . . . " Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of

> the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802, 804).

A. The Prima Facie Case

To make out a prima facie case of disparate treatment, a plaintiff must show that: (1) she belongs to a protected class; (2) she was performing her duties satisfactorily; (3) the defendant took adverse action against her; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *See e.g. Dister v. Continental Group*, Inc. 859 F,2d 1108, 1114 (2d Cir. 1988); *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994); *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). The burden that an employment discrimination plaintiff must meet in order to defeat summary judgment at the prima facie stage is *de minimis*. *McLee*, 109 F.3d at 134.

For purposes of discussion only, the court will assume that the plaintiff has made out a prima facie case of race discrimination, in that her race is protected by Title VII, she was performing her duties satisfactorily, and the CHRO did, indeed, take adverse action against her, including issuing her three written warnings, suspending her two times, and eventually terminating her employment.

B. The Defendant's Non-Discriminatory Reason

To rebut an inference of discrimination established by the plaintiff's prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). The defendant must state a "clear and specific" reason. *Meiri v. Dacon*, 759 F.2d 989, 997 (2d. Cir. 1985). Here, the CHRO has stated that it took the actions condemned because of the plaintiff's "insubordination, poor performance, and violence in the workplace." The court is satisfied that the defendant has sufficiently rebutted the inference of discrimination raised by the plaintiff's prima facie case.

C. Pretext/Discrimination

In the final stage of the *McDonnell Douglas* analysis, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason articulated by the defendant for the adverse action was false, and that the real reason for the action was illegal discrimination. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 141 (2d Cir. 1993). The plaintiff has failed to meet this burden.

In support of her race discrimination claim, Richardson argues that she "is aware of other similarly situated employees, namely, one Kathy Stone, who was accused of the same work misgivings as the plaintiff and was not disciplined." However, Richardson

has offered no evidence to support this contention. The record contains nothing more than an email that Richardson herself sent to Watts-Elder on July 3, 2001, defending her method of making monetary deposits – a method that subjected Richardson to discipline in the form of a written warning.[2]

This evidence cannot satisfy the burden of proving pretextual discrimination where, as here, there is overwhelming evidence of her insubordination and hostile behavior supporting the CHRO's legitimate business reason for the warnings, suspension and employment termination. *See e.g., Getschmann v. James River Paper Co.*, Inc., 822 F. Supp. 75, 78 (D. Conn. 1993) (favorable prior work performance and two discriminatory statements by a supervisor were "too slender a reed to carry the weight of the charge" at summary judgment where there was overwhelming evidence of legitimate business reason). The overwhelming evidence here includes a finding by the Connecticut Employment Security Appeals Division that Richardson was fired "for deliberate misconduct which constituted willful misconduct in the course of her employment." The record also includes a finding by independent investigator, Williams, that "[the plaintiff's] behavior

---

[2] On July 17, 2001, Appleton issued Richardson a written warning for "violation of a directive to provide explanation for 52 untimely deposits and failure to follow comptroller guidelines."

clearly violates the Workplace Conduct Policy." Specifically, Williams found that:

> [the plaintiff's] behavior has created a hostile and chilling work environment. Examples include: screaming and slamming things; speaking to her supervisor in a loud voice; use of aggressive non-verbal communication; shaking her finger in Leanne's face; and constantly interrupting when others talk.

Particularly troublesome to Richardson's case is the fact that her several suspensions and job termination were at the behest of Watts-Elder, herself an African American woman, but more importantly, the same person who recommended Richardson to the OPM in 1997 and then facilitated Richardson's transfer to the CHRO in 2000. Accordingly, the CHRO is entitled to judgment as a matter of law on the race discrimination claim.

2. Retaliation

Title VII also makes it unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a).

The *McDonnell Douglas* burden shifting framework which is applicable to claims of disparate treatment also applies to claims of retaliation. See

Richardson v. N.Y. State Dep't. of Correctional Service, 180 F.3d 426, 443 (2d. Cir. 1999).

> In the context of a motion for summary judgment, the plaintiff must first demonstrate a prima facie case of retaliation, after which the defendant has the burden of pointing to evidence that there was a legitimate, nonretaliatory reason for the complained action. If the defendant meets its burden, the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation. *Id.*

A. The Prima Facie Case

"To establish a prima facie case of retaliation, a plaintiff must show: (1) participation in a protected activity that is known to the defendant; (2) an employment decision or action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse decision." *Id.*

(i) Known Protected Activity

The plaintiff has argued that she engaged in protected activity on at least four occasions: (a) when she filed her first grievance against Appleton on April 30, 2001; (b) when she filed her second grievance against Appleton on July 5, 2001; (c) when she filed a complaint against the CHRO with the CHRO on July 30, 2001; and (d) when she filed a complaint against

the CHRO with the APA concerning Williams' investigation.

(ii) Adverse Employment Action

Richardson claims the CHRO retaliated against her in three ways: (a) by issuing her three written warnings; (b) by suspending her two times; and (c) by terminating her employment.

(iii) Causal Connection

The court will assume for purposes of discussion only that the plaintiff has established a causal relationship.

B. The Defendant's Non-Discriminatory Reason

To rebut an inference of retaliation established by the plaintiff's prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action. *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991). The defendant must state a "clear and specific reason. *Meiri v. Dacon*, 759 F.2d 989, 997 (2d. Cir. 1985).

Although Richardson has established a prima facie case of retaliation, the defendant has countered with a legitimate non-discriminatory reason for the alleged retaliation, "namely insubordination, poor performance, and violence in the workplace." The court is satisfied that CHRO has sufficiently rebutted

the inference of retaliation raised by Richardson's prima facie case.

C. Pretext/Discrimination

In the final stage of the *McDonnell Douglas* analysis, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reason articulated by the defendant for the adverse action was false, and that the real reason for the action was retaliation. *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 141 (2d Cir. 1993). "[A] plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997). Here, Richardson's broad statements: "the reason [for the suspension] was false and pretextual because the plaintiff had never violated any such orders" and "On October 16, 2001, Watts-Elder terminated the plaintiff's employment for the same false and pretextual reasons," unsubstantiated by any corroborative evidence, are insufficient to show pretext. Accordingly, the CHRO is entitled to judgment as a matter of law on the retaliation claim.

II. Count Two: Race and Color Discrimination and Retaliation Against Defendants Appleton and Watts-Elder In Violation of 42 U.S.C. §§ 1981 and 1983 and the Connecticut Constitution.

In Count Two, Richardson alleges that Appleton and Watts-Elder violated her right to equal protection of the laws as secured by the Fourteenth Amendment. She brings this action against Watts-Elder in her official capacity and against Appleton in her individual capacity pursuant to 42 U.S.C. §§ 1981 and 1983.

1. Watts-Elder In Her Official Capacity

The defendant argues that "the claim against Watts-Elder must be dismissed because [as a claim against Watts-Elder in her official capacity] it is barred by the 11th Amendment." Richardson does not contest this in her brief, but rather "requests leave to amend her complaint to cure the technical defect and reflect an action against defendant Cynthia Watts-Elder in her individual capacity."

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "As interpreted, the Eleventh Amendment generally prohibits suits against state

governments in federal court." *Richardson v. New York*, 180 F.3d 426, 447-48 (2d. Cir. 1999) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). "This immunity also extends to state officials sued in their official capacities." *Alungbe v. Bd. of Trustees*, 283 F. Supp. 2d 674, 687 (D. Conn. 2003) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

Because Richardson has sued Watts-Elder in her official capacity only, the claims against Richardson [sic] are barred by the Eleventh Amendment. Further, because leave to amend may only be granted at this juncture based upon argument under Fed. R. Civ. P. 15(a), and no such argument is presented here, the court declines to allow any such amendment.

2. Appleton In Her Individual Capacity

Appleton first argues that Richardson cannot prove a prima facie case under 42 U.S.C. § 1981 because 42 U.S.C. § 1983 is the exclusive remedy against state actors for the violation of Constitutional rights. Richardson does not respond to this assertion.

A. Section 1981

Section 1981 provides, in relevant part, that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the

full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . " 42 U.S.C. § 1981(a).

In *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), the Supreme Court held that "the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." *Jett*, 491 U.S. at 735; *see also Patterson v. County of Oneida*, 375 F.3d 206 (2d Cir. 2004) ("The express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units"). Because there is no dispute that Appleton is a state actor, the court concludes that § 1983 provides the exclusive remedy for violation of her constitutional rights.

B. Section 1983

Section 1983 allows an action against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, "that conduct [is] also action under color of state law and will support a suit under § 1983." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982). "State employment is generally sufficient to render the defendant a state actor." *Patterson*, 375 F.3d 206, 230 (2d Cir. 2004). "Once action under color of state law is established, [Richardson's] equal protection claim parallels [her] Title VII claim. See *Feingold v. New York*, 366 F 3d 138, 159 (2d Cir. 2004). "[T]he elements of one are generally the same as the elements of the other and the two must stand or fall together." *Id.*

Here, Richardson alleges that "the actions of Appleton . . . were under color of law and violated Ms. Richardson's rights . . . to equal protection of the laws as protected by the Fourteenth Amendment to the U.S. Constitution . . . " However, because Richardson has failed to raise a genuine issue of material fact as to her Title VII claims, her § 1983 claim must fail as well. Accordingly, Appleton is entitled to judgment as a matter of law on her claim of Constitutional violations.

III. Count Three: Title VII Violations As Against The OPM

In Count Three, Richardson alleges that the OPM violated Title VII by "challenging the arbitrability of the Richardson grievances because she had filed complaints of discrimination and retaliation with the CHRO and the EEOC," and by "negotiating and executing provisions of a collective bargaining agreement that allowed the State, through OPM, to retaliate against employees, including Ms. Richardson."

OPM argues that "[Richardson's claim] . . . that her collective bargaining agreement ("CBA") violated the retaliation provisions of Title VII is misdirected." The defendant points out that the terms of Richardson's CBA preclude her from arbitrating discrimination claims once she has filed a CHRO complaint against OPM and also that the Federal Arbitration Act ("FAA") gives great deference to parties' agreements not to arbitrate. The CBA states, in pertinent part:

> Notwithstanding any other provisions of this agreement, the following matters shall be subject to the grievance procedure but not to arbitration:
>
> . . .
>
> (2) disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on

> Human Rights and Opportunities arising from the same common nucleus of operative fact.

Richardson does not contest the preclusive language of the CBA, but argues instead that "Richardson's action is not barred by the FAA."

The Federal Arbitration Act ("FAA") provides, in relevant part, that a written provision in "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. According to the Supreme Court, "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *EEOC v. Waffle House*, 534 U.S. 279, 293 (2002) (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* 489 U.S. 468, 478 (1989)).

Here, Richardson and her Union have not agreed to arbitrate – the CBA includes an express provision *not* to arbitrate. The provision does not violate the FAA, and it cannot give rise to an inference that OPM, by enforcing the terms of the CBA, was motivated by a discriminatory animus. Accordingly, OPM is entitled to judgment as a matter of law on the Title VII claim.

IV. Counts One and Three: CFEPA Violations Against The CHRO and The OPM.

In Counts One and Three, Richardson alleges that the CHRO and the OPM violated the CFEPA by discriminating against her on the basis of her race and color and because she previously opposed and filed complaints of race and color discrimination.

CHRO and OPM respond, however, that Richardson's state law claims against them are barred by the Eleventh Amendment because Connecticut has not waived its immunity in federal court. Richardson does not respond to this assertion.

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "As interpreted, the Eleventh Amendment generally prohibits suits against state governments in federal court." *Richardson v. New York*, 180 F.3d 426, 447-48 (2d. Cir. 1999) (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984)). "This immunity also extends to state officials sued in their official capacities." *Alungbe v. Bd. of Trustees*, 283 F. Supp. 2d 674, 689 (D. Conn. 2003) (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). "This protection presupposes: (1) that each state is a sovereign entity in our federal system; and (2) that it is inherent in the nature of sovereignty not

to be amenable to the suit of an individual without its consent." *Close v. New York*, 125 F.3d 31, 36 (2d. Cir. 1997) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

Eleventh Amendment immunity is not absolute, however. "To the contrary, a state may be divested of immunity and haled into federal court in one of two ways: (1) Congress may abrogate the sovereign immunity through a statutory enactment; or (2) a state may waive its immunity and agree to be sued in federal court." *Richardson*, 180 F.3d at 448 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)). "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* (citing *Atascadero*, 473 U.S. at 241). "The fact that a state has consented to suit in the courts of its own creation does not mean that it consents to suit in federal court." *Page v. Connecticut Dep't of Public Safety*, 185 F. Supp. 2d 149, 159 (D. Conn. 2002) (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)). Stated differently: "A state may consent to suit in its own courts without consenting to suit in federal court." *Alungbe*, 283 F.Supp. 2d at 687 (citing *Smith*, 178 U.S. at 441-45).

Connecticut law provides that:

> Any person who has timely filed a complaint with the Commission on Human Rights and Opportunities in accordance with section 46a-82 and who has obtained a release from the commission in accordance with section

> 46-83a or 46a-101, *may also bring an action in the superior court* for the judicial district in which the discriminatory practice is alleged to have occurred or in which the respondent transacts business, except any action involving a state agency or official may be brought in the superior court for the judicial district of Hartford.

(Italics added) Conn. Gen. Stat. § 46a-100. "Under Connecticut law, Connecticut waived its immunity for suit in state court for CFEPA claims. But it has not clearly expressed a waiver to suit in federal court. Therefore, the courts of this district have consistently found that CFEPA claims against the state or its agents are barred by the Eleventh Amendment." *Alungbe*, 283 F. Supp. 2d at 687 (citing e.g. *Lyon v. Jones*, 168 F. Supp. 2d 1, 6 (D. Conn. 2001)). Accordingly, the CHRO and the OPM are entitled to judgment as a matter of law on the state law claims.

Count IV: Retaliation against Defendants Yelmini and Bardot in violation of 42 U.S.C. §§ 1981 and 1983 and the Connecticut Constitution.

Because Richardson has not addressed these allegations in her brief, she has failed to raise a genuine issue of material fact as to Count IV. Accordingly, the defendant's motion for summary judgment is GRANTED as to Count IV.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment (document no. 37) is hereby GRANTED.

It is so ordered this 31st day of March, 2005, at Hartford, Connecticut.

/s/

Alfred V. Covello
United States District Judge

OPPOSITION BRIEF

(4)

No. 08-1226

In The
Supreme Court of the United States

LEONYER RICHARDSON,

Petitioner,

vs.

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, OFFICE OF POLICY AND MANAGEMENT, CYNTHIA WATTS-ELDER, LEANNE APPLETON, LINDA YELMINI, DONALD BARDOT and ADMINISTRATIVE AND RESIDUAL EMPLOYEES UNION,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT, ADMINISTRATIVE & RESIDUAL EMPLOYEES UNION LOCAL 4200 CFEPE, AFT, AFL-CIO

WALDEMAR J. PFLEPSEN, JR.
Counsel of Record
JORDEN BURT LLP
1025 Thomas Jefferson St. NW
Suite 400 East
Washington, DC 20007-5208
202-965-8100

JAMES M. SCONZO
JONATHAN C. STERLING
JORDEN BURT LLP
300 POWDER FOREST DR.
STE. 301
SIMSBURY, CT 06089-9658
860-392-5042

QUESTION PRESENTED FOR REVIEW

Whether, under Title VII of the Civil Rights Act of 1964, a State employees' union and the State may collectively bargain for and agree to an election of forum clause which precludes arbitration of an employee's discrimination grievance in the event that the employee also files an administrative complaint of discrimination with the State agency that enforces discrimination law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Respondent Administrative and Residual Employees Union, Local 4200 CFEPE, AFT, AFL-CIO (the "Union") files this brief in opposition to the Petition for a Writ of Certiorari (the "Petition").

INTRODUCTION

Petitioner's claim is moot and she lacks standing to advance a further appeal. Moreover, this case does not present any question that divides the circuits or that presents important unresolved issues. Rather, this case involves a unique collective bargaining agreement provision of a type that does not appear to have been the subject of any prior published appellate decision. Moreover, this Court's recent decision in *14 Penn Plaza v. Pyett* erases any doubt that the type of provision is permissible.

STATEMENT

I. FACTS

The Petitioner, Leonyer Richardson, was employed as fiscal administrative officer for the State of Connecticut Commission on Human Rights ("CHRO"), beginning on October 6, 2000. Pet.App.C 3. Prior to that time, she had been employed by the Department of Environmental Protection ("DEP") and Office of Policy and Management ("OPM"). Pet.App. 2-3. While at DEP and OPM, Petitioner had interpersonal conflicts with her co-workers and DEP reprimanded her for threatening a co-worker. *See* Pet.App.C 3.

Shortly after her transfer to CHRO, Petitioner began to exhibit misbehaviors similar to those she exhibited at OPM and DEP. In February 2001, Petitioner received a written warning from her supervisor, Leanne Appleton ("Appleton"), for violating the security of the CHRO computer system. Pet.App.C 3. On April 6, 2001, Petitioner received another written warning for several infractions, including violating a direct order, hanging up on Appleton, and leaving her rude notes. Pet.App.C 3-4. On July 17, 2001, the Petitioner was issued another warning for failing to explain her actions as requested. Pet.App.C 4. As a result of her insubordination and offensive conduct towards co-workers and supervisors, on October 16, 2001, Cynthia Watts-Elder ("Watts-Elder"), the CHRO's Executive Director, terminated Petitioner's employment. Pet.App.C 5.

II. THE COLLECTIVE BARGAINING AGREEMENT

Many of the terms and conditions of the Petitioner's employment with the CHRO were governed by a collective bargaining agreement (the "CBA") between the Union and the State of Connecticut. Pet. 4. The election of forum provision contained in the CBA states, in pertinent part:

> disputes over claimed unlawful discrimination shall be subject to the grievance procedure but shall not be arbitrable if a complaint is filed with the Commission on Human Rights and Opportunities arising from the

same common nucleus of operative fact.

Pet.App.C 7.

III. THE PETITIONER'S DISCHARGE AND HER GRIEVANCE AGAINST THE CHRO

The Petitioner grieved her termination and on October 22, 2001 a hearing was held by the State Office of Labor Relations. Pet.App.C 5. Thereafter, the Union learned that the Petitioner had amended a then-pending CHRO administrative complaint to include a race discrimination claim regarding her termination. Id. As a result, and in accordance with the CBA's election of forum provisions, the Union notified the Petitioner that it was withdrawing its request for arbitration of her grievance regarding her termination. Id.

On April 9, 2002, the Petitioner filed an administrative complaint of discrimination against the Union, alleging that the Union had retaliated against her by refusing to take her grievance to arbitration. Pet.App.C 5-6. A Charge of Discrimination was filed on the same date with the United States Equal Employment opportunity Commission ("EEOC") incorporating the same allegations. Pet.App.A 8. On September 4, 2002, the CHRO dismissed the Petitioner's complaint, finding that the Union's actions were in accordance with the CBA. Pet.App.A 9.

IV. PROCEDURAL HISTORY

In April 2002, the Petitioner commenced a civil action in the United States District Court for the District of Connecticut naming as defendants the CHRO, OPM, Appleton, Linda Yelmini ("Yelmini"), Donald Bardot ("Bardot") and Watts-Elder (collectively the "State Defendants"), as well as the Union. Pet.App.A 9. In her complaint she alleged retaliation and/or racial discrimination against each defendant. Id.

Petitioner claimed that the CHRO and OPM retaliated against her and discriminated against her based on her race and color, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Connecticut Fair Employment Practices Act ("CFEPA"). Id. She also made other claims under 42 U.S.C. §§ 1981 and 1983.

Petitioner further claimed that the Union violated Title VII and CFEPA, as well as the duty of fair representation. Pet.App.C 2. These claims were based on her allegation that in negotiating and executing a collective bargaining agreement that allowed the State to retaliate against employees, including Petitioner, who exercised their rights to file discrimination complaints with the CHRO, the Union had discriminated against Petitioner, and other similarly situated union members. Pet. 2-3.

In June 2004, the State Defendants filed a motion for summary judgment, seeking disposition in their favor of all claims against them. Pet.App.B 6. On March 31, 2005, the district court issued an order

granting the State Defendants' motion for summary judgment. Pet.App.A 9. The district court held that the State Defendants had offered sufficient legitimate, non-discriminatory reasons for their treatment of the Petitioner, and that she had offered insufficient evidence that the reasons given were pretextual. Pet.App. 9-10. The district court also held similarly regarding the Petitioner's retaliation claim and held that OPM had not violated Title VII by virtue of its execution of the CBA's election of forum clause. Pet.App. 10. The district court granted the State Defendants' motion for summary judgment in its entirety. Pet.App.C 6-7.

Thereafter, the Petitioner filed a motion to alter judgment seeking to have the district court "correct" its ruling on the motion for summary judgment, arguing that only the State Defendants, and not the Union, had moved for summary judgment and the court's opinion addressed only the counts against the State Defendants. Pet.App.C 1-2. The Union opposed the Petitioner's motion, arguing, inter alia, that the court's conclusions in its summary judgment decision entitled the Union to summary judgment as well. After reviewing that motion, the district court held that the Union had not violated Title VII, CFEPA, Sections 1981 or 1983, or its duty of fair representation because the CBA's election of forum provisions were valid and the Union simply proceeded according to contract. Pet.App.A 11; Pet.App.C 10-15. Thus, on November 29, 2005, the district court corrected its judgment, making it applicable to all defendants, including the Union. Pet.App.C 16.

On January 27, 2006, Petitioner filed a notice of appeal. On July 7, 2008, the Second Circuit issued its order affirming the grant of summary judgment. Pet.App.A. The Second Circuit held that the CBA election of forum provision did not violate the prohibition on prospective waivers of Title VII rights and that the Union's withdrawal from arbitration did not constitute an adverse employment action. The Second Circuit elaborated that the CBA election-of-forum provision qualified as a "reasonable defensive measure" by the State to litigate discrimination claims brought against it effectively and efficiently. Pet.App.A 20-27.

Moreover, the Second Circuit agreed with the district court that the Petitioner's insubordination and hostile behavior were legitimate, non-race based reasons for her termination, and that she presented no evidence to support allegations of retaliation against her employer. Pet.App.A 28-30. In her Petition, Petitioner has not challenged the Second Circuit's holding on this wrongful termination claim.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court of the United States sets forth the standard that has long governed petitions for review on certiorari: petitions are granted only "for compelling reasons." Rule 10 also sets forth what are generally considered to be "compelling reasons," which include: where a federal appeals court has decided a matter contrary to how this Court, a federal appeals court, or a state court of last resort has decided a similar matter; where a federal appeals court has vastly departed

from the accepted and usual course of judicial proceedings or where there is an important unsettled question of federal law. Here, the issue is moot and Petitioner therefore lacks standing to advance any further appeal. Moreover, there are no such compelling reasons for granting the Petition.

I. PETITIONER'S CLAIM IS MOOT AND SHE LACKS STANDING TO ASSERT THIS APPEAL.

The Second Circuit affirmed the district court's holding that the Petitioner's discharge did not violate Title VII. The Petitioner has not appealed that ruling and it has become the law of the case. Any arbitration proceeding would, therefore, have to honor the holding of the trial court that Title VII was not violated. As such, an arbitration would be pointless; there is no practical relief available to the Petitioner from this Court that could reinstate her to her job or otherwise provide her with any benefit. Consequently, the issue raised on appeal is a moot point and the Petitioner cannot point to any injury in fact.

> A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated, then it becomes impossible for the court to grant any effectual relief whatever' to

> the prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.

(Citations, quotation marks omitted) *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000).

Here, even if the Court were to find that the CBA election of forum provision was retaliatory, no effectual relief could be granted. The law of the case dictates that her discharge was lawful and that any arbitration would have been unsuccessful. Moreover, any future arbitration of this matter ordered by the district court on remand would be ineffectual because the district court's decision would be binding upon the arbitrator. *See, e.g., Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) ("where the prerequisites for collateral estoppel are satisfied arbitrators must give preclusive effect to prior federal judgments."). The Petitioner therefore lacks a legally cognizable interest in the outcome of this case and her case is moot. Furthermore, the case is moot because Petitioner is no longer employed by the State so the CBA does not govern her employment, and there is no risk that the alleged wrong will be repeated.

For these same reasons, the Petitioner cannot meet Article III's standing requirement. To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to

merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). To establish redressability, must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 181.

Here, the Petitioner's alleged harm is entirely hypothetical. She only suffered harm if she would have prevailed in her arbitration, which the district court, by granting summary judgment to the State on her wrongful discharge claim, determined she would not have. As such, the Petitioner cannot show that she suffered an injury that can be redressed by a favorable decision, and the Court need not reach the supposed "important question" proposed in the Petition.

II. PETITIONER FAILED TO EXHAUST HER INTERNAL REMEDIES WITH THE UNION.

Where reinstatement of a grievance may be effectuated through a union appeals process that reverses a union's initial decision, that union is entitled to a failure to exhaust defense. *See Clayton v. United Automobile Workers*, 451 U.S. 679, 691 n18 (1981) (finding such a defense available to employers); *see also Stepney, LLC v. Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003) ("[i]t is a settled principal of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter.").

In this case, the district court found that Petitioner could have appealed to the Representative Assembly the Union's decision not to proceed to arbitration, or she could have pursued her grievance not through her Union, but as an individual. Pet.App.C 12. Petitioner failed to respond to this argument in the district court, did brief it in her appeal to the Second Circuit, and has failed to address it here. As such, this serves as an alternative ground to affirm summary judgment in the Union's favor, and means that the Petition can be denied on this basis and the Court can avoid addressing the alleged important question Petitioner sets forth in her Petition.

III. THE COURT'S RECENT DECISION IN 14 PENN PLAZA V. PYETT REQUIRES DENIAL OF THE PETITION.

Subsequent to Petitioner's filing of her Petition, this Court decided *14 Penn Plaza LLC v. Pyett*, -- U.S. --, 129 S.Ct. 1456 (2009), holding that a provision in a collective bargaining agreement expressly requiring union members to arbitrate age-discrimination claims is enforceable. The reasoning of the decision is equally applicable to Title VII claims. *See, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The "interpretation of Title VII ... applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII,' " (citation omitted)).

Pyett was the culmination of a sea change beginning with the decision of the Court in *Gilmore*

v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), and continuing with its decisions in *Waffle House v. EEOC*, 534 U.S. 279 (2002), and *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), each of which signaled a greater willingness to recognize election of forum provisions to resolve federal statutory anti-discrimination claims. These decisions also signaled an increasing retreat from the position taken by the Court in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which prohibited prospective waivers of Title VII claims, and assumed that an agreement to arbitrate Title VII claims was tantamount to a waiver of those claims. The *Pyett* court deemed this assumption to be erroneous and stated that it "rested on a misconceived view of arbitration that this Court has since abandoned." *Id.* at 1469. Therefore, Petitioner's argument that *Gardner-Denver* is at tension with other Supreme Court precedent, or that that it is contrary to the Second Circuit's holding in this case, is without merit. In *Pyett,* the Court settled these concerns.

Pyett leaves no doubt that the Union and the Petitioner's former employer could have agreed to mandate arbitration of her Title VII and CFEPA claims. If the CBA could have mandated arbitration of those claims, surely it could have been more generous and given her a ***choice*** whether to pursue arbitration or to bring an administrative discrimination claim with the CHRO.[1] To hold

[1] Under the terms of the CBA, even if Petitioner chose arbitration, she still could have filed a Title VII charge with the EEOC.

otherwise would yield a result that is incongruous with *Pyett*, among other Supreme Court precedent.

Petitioner notes in her Petition that "[t]his Court has specifically declined to reach the question whether a collective bargaining agreement may encompass the waiver of employment discrimination claims." Pet. 6-7. Petitioner further states that this case presents issues of fundamental national importance because "it presents an opportunity for "this Court to resolve once and for all time the tension between *Gardner-Denver* and more recent precedent [suggesting statutory discrimination claims can be compelled to arbitration]" Pet. 15. Now that this issue had been unequivocally resolved by the Court, the Petition fails to present any "compelling reasons" for granting the Petition, and should be denied.

IV. THE PROVISION AT ISSUE DID NOT AFFECT PETITIONER'S ABILITY TO FILE FEDERAL DISCRIMINATION CLAIMS.

The CBA clause at issue here provided only that, in the event that a discrimination complaint is filed with the CHRO, any pending grievance regarding the same alleged discrimination would not proceed to arbitration. As the Second Circuit observed, "Richardson remained free to file a charge with the EEOC, as she did, and to pursue a Title VII action in federal court, as she has. She did not prospectively waive any of her Title VII rights, nor did her union do so on her behalf." Pet.App.A 20. The Second Circuit elaborated as follows:

> [The clause] does not foreclose other avenues of relief, such as the right to pursue claims in federal court, which was at issue in *Gardner-Denver*, or the right to pursue claims with non-CHRO bodies such as the EEOC. Indeed, the CBA does not appear even to foreclose subsequent filing of claims with the CHRO. . . . It only requires that the employee make a concrete choice, at a specific time, between filing a state claim with the CHRO and having the union pursue his or her grievance in arbitration.

Pet.App.A 23. No other court appears to have addressed a collectively-bargained clause like the one at issue in this case, and there is no evidence that such clauses are common. This discredits Petitioner's claim that "this case presents issues of fundamental national importance." Pet. 14.

These facts distinguish this case from *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 506 U.S. 906 (1992), which Petitioner characterizes as being at odds with the Second Circuit's decision in this case. Pet. 7. The CBA provision in *Board of Governors* stated that the right to an in-house arbitration vanished where "an employee seeks resolution of the matter in any other forum." *Id.* at 426. That provision obviously contemplated a waiver of arbitration where a charge of discrimination alleging a violation of Title VII claims was filed with the EEOC. Therefore, the plaintiff in *Board of*

Governors would have been forced to waive federal statutory rights if he pursued arbitration. Here, however, under the CBA, Petitioner could have filed a complaint with the EEOC based on Title VII violations without forfeiting any contractual right to arbitration. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) (EEOC has concurrent jurisdiction with state deferral agencies). As the court observed in *United States v. New York City Transit Auth.*, 97 F.3d 672 (2d Cir. 1996), "*Board of Governors* [is] therefore distinguishable on the ground that the assertion of Title VII rights in th[at] case[ ] cost employees the right...to proceed in a binding arbitration...." *Id.* at 679. The Petitioner's failure to exhaust her remedies also distinguishes this case from the cases cited by the Petitioner, especially *Board of Governors*.

Moreover, *Board of Governors* was decided at a time when the prevailing law in the Seventh Circuit was that statutory discrimination claims could not be subject to compulsory arbitration by virtue of a collective bargaining agreement. In this regard, the *Board of Governors* court stated: "Nor may the Board successfully argue that unions be permitted to waive an employee's rights under the ADEA, for it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining." 957 F.2d at 431. Given this Court's holding to the contrary in *Pyett*, the law applicable in the Seventh Circuit has changed, and the continuing validity of *Board of Governors* is in doubt.

V. THE NEGOTIATION OF THE PROVISION WAS A REASONABLE DEFENSIVE MEASURE AND NOT RETALIATORY.

The Second Circuit's decision was based largely on the recognition that the agreed-to clause constituted a "reasonable defensive measure" that did not violate federal law. In *New York City Transit Authority*, the Second Circuit held that the Transit Authority's policy of directly referring discrimination litigants to its law department, rather than first directing them to an internal EEO Division as it would non-litigant complainants, was not discriminatory. 97 F.3d at 677-78. The differential treatment effectuated by this policy was explained as the consequence of a "reasonable defensive measure"--i.e., centralizing the City's authority to respond to discrimination suits--that would not support an inference of retaliatory motive. *Id.* at 677. In so holding, the court offered the following observation:

> [I]t seems obvious that the commencement of litigation or administrative proceedings would galvanize the employer to seek legal counsel or otherwise to shift tactics. This phenomenon does not support an inference of retaliation. Legitimate and ordinary defensive interests furnish all the cause and effect needed to account for it.

Id. at 678.

The First Circuit also has endorsed an analysis similar to the "reasonable defensive measure" analysis. In *New England Health Care Employees Union, Dist. 1199 v. Rhode Island Legal Svcs.*, 2001 WL 34136692 (D.R.I. 2001), *affirmed by* 273 F.3d 425 (1st Cir. 2001), the relevant collective bargaining agreement provided that: "RILS shall not be required to arbitrate any dispute which is pending before any administrative or judicial agency." After the employee filed a grievance alleging she was discriminatorily discharged because of her physical disability, she filed an administrative complaint of discrimination with the Rhode Island Human Rights Commission (RIHRC) alleging violations of state and federal anti-discrimination law. The arbitrator denied the grievance on the ground that arbitration was barred by the contract. In an action by the employee's union to vacate the award and against the employer for retaliation, the court granted summary judgment to the employer. The court stated:

> RILS has articulated a legitimate non-discriminatory reason for Article 20.3(f); namely, to prevent the wasteful duplication of effort and the risk of inconsistent results that is inherent in simultaneously defending the same claim in two fora....[E]ven if a right to arbitrate matters that are the subject of other proceedings existed, and the loss of that right could be characterized as adverse employment action, the retaliation claim fails because there is no basis for inferring that Article 20.3(f)

> was prompted by any discriminatory purpose. On the contrary, the provision is contained in a CBA negotiated at arms length, between RILS and the Union itself. Consistent with the National Labor Relations Act's policy of deferring to the collective bargaining process as a means of resolving workplace disputes, see 29 U.S.C. § 151, courts, properly, are hesitant to invalidate provisions of a CBA without good reason.

Id. at *3.

Here, the Petitioner was a CHRO employee at the time that she filed her grievance that the Union refused to bring to arbitration. The CHRO certainly had the right to preclude duplicative discrimination complaints against it in two fora it sponsors by limiting state law discrimination complainants to either arbitration or an administrative complaint. By filtering some of the discrimination complaints against it (those that were proceeding to arbitration), through its administrative arm rather than a State arbitrator, the CHRO employed a reasonable, cost-conserving measure. The Petitioner's right to redress for her federal discrimination claims remained intact, for she could have pursued such claims with the EEOC.

The Union did not retaliate against Petitioner by agreeing to follow a legitimate practice under *New York City Transit Authority*. There are several legitimate and non-discriminatory reasons for the

CBA clause at issue here. First and foremost, such a clause is the product of arms-length negotiations between the Petitioner's elected representatives and her employer. In no way is the Union punishing members by agreeing to the clause or by abiding by it; rather, by proxy, the membership has agreed to the provision. The Union ostensibly received benefits in consideration for defining its members' privileges in order to secure other contractual rights evident in the CBA. Additionally, the clause confers a benefit on the Union membership: elimination of wasteful costs. By eliminating the possibility of some duplicative litigation, the Union could more cost-effectively advocate for its members where those efforts were more needed. Unions operate with limited resources and must make attempts in negotiating collective bargaining agreements to allow for the most efficient advocacy for their membership. At the same time, the CBA's exception is narrowly tailored to ensure that members' rights are protected because they are only required to forgo duplicative claims in certain situations, those that would burden the CHRO unduly with claims in two fora under its control.

Petitioner has not and cannot point to any disagreement among the circuits as to the applicability of the "reasonable defensive measure" analysis, and does not argue that the invocation of this analysis was a vast departure from the accepted and usual course of judicial proceedings. As such, there is no compelling reason to grant the Petition.

VI. THE FAA AND CASES INTERPRETING IT COMPEL THE CONCLUSION THAT THE CBA CLAUSE IS VALID.

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") also compels the conclusion that the clause at issue is valid. The FAA states in part that:

> A written provision in a . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 2.[2]

In *Circuit City*, this Court held that, based on the FAA, arbitration agreements with respect to employment contracts are generally enforceable. 532 U.S. at 114-15. Here, Petitioner was not even required to arbitrate any federal statutory or constitutional claims. She was permitted to pursue the same claims before the EEOC and in a lawsuit in the district court. To hold the clause invalid in this case would impose a barrier to agreed-upon

---

[2] Connecticut law provides similarly. *See* Conn. Gen. Stat. § 52-408.

arbitration of state law claims, which would in turn violate the FAA. The law is settled in this regard and no contrary positions exist among the circuits, particularly in the wake of *Pyett*.

VII. THERE WAS NO MATERIALLY ADVERSE ACTION.

As discussed above, the contract clause at issue is not retaliatory, but rather an agreed upon election of forum provision. Petitioner cannot prove the elements of retaliation claim, particularly that she suffered any materially adverse action. In *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), this Court clarified that an "adverse employment action," as defined in the Title VII discrimination context, was not necessary to prove a claim of retaliation. Rather, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks omitted).

Petitioner contends that the Union's dissuading act was the deprivation of an arbitration regarding her grievances. This is simply not true. On the contrary, the Petitioner has fully pursued all of her claims of discrimination. The incorporation by the *White* court of the reasonableness requirement dictates that where an employee's representative -- the Union here -- collectively bargains on behalf of the employee and agrees to such a provision, the collectively bargained-for provision cannot be

legitimately termed adverse. The *White* court also made clear that "material adversity [is required]...to separate significant from trivial harms." *Id.* Requiring the Petitioner, like all Union members, to select another forum and avoid duplicative proceedings is certainly not retaliatory. At worst, Petitioner was denied the ability to pursue duplicative state law claims in two fora. This would not have dissuaded a reasonable worker from filing a complaint of discrimination. The affect on the Petitioner can only be considered theoretical. It should be noted that nothing in the Agreement prohibited the Petitioner from filing a Charge of Discrimination with the EEOC based on a violation of federal discrimination law, from filing a lawsuit based on allegations of federally-barred discrimination or retaliation, or from assisting others in prosecution of any type of action, including with the CHRO. She also could have filed a claim with the CHRO after her arbitration.

Following *White*, both the Second and Seventh Circuits (as well as all other circuits) require a "materially adverse action" to state a retaliation claim under Title VII. *See Breneisen v. Motorola, Inc.*, 512 F.3d 972, 979 (7th Cir. 2008) (requiring materially adverse action to state a retaliation claim under Title VII, citing *White*); *Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 208 (2d Cir. 2006) (same). Because there was no materially adverse action here, there is no compelling reason to grant the Petition. Petitioner has not pointed to any cases holding that invocation of a election of forum clause similar to that in this case constitutes a materially adverse action.

CONCLUSION

For the reasons set forth above, this Court should deny the Petitioner's Petition.

Respectfully submitted,

WALDEMAR J. PFLEPSEN, JR.
Counsel of Record
JORDEN BURT LLP
1025 Thomas Jefferson St. NW
Suite 400 East
Washington, DC 20007-5208
202-965-8100

JAMES M. SCONZO
JONATHAN C. STERLING
JORDEN BURT LLP
300 POWDER FOREST DR.
STE. 301
SIMSBURY, CT 06089-9658
860-392-5042

JUNE 2009